AND
BRIEFS

16-327

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

JAE LEE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

To establish prejudice under *Strickland* v. *Washington*, 466 U.S. 668 (1984), a defendant who has pleaded guilty based on deficient advice from his attorney must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985). In the context of a noncitizen defendant with longtime legal resident status and extended familial and business ties to the United States, the question that has deeply divided the circuits is whether it is always irrational for a defendant to reject a plea offer notwithstanding strong evidence of guilt when the plea would result in mandatory and permanent deportation.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Petitioner is Mr. Jae Lee. Respondent is the United States of America.

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The opinion of the United States Court of Appeals for the Sixth Circuit, App. 1a–10a, is reported at 825 F.3d 311. The opinion of the United States District Court for the Western District of Tennessee, App. 11a–50a, is not reported but is available at 2014 WL 1260388. The Report and Recommendation of the Magistrate, 51a–77a, is not reported but is available at 2013 WL 8116841.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2016. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

INTRODUCTION

Jae Lee moved from South Korea to the United States with his family in 1982 and has lived here legally ever since. After completing high school, Mr. Lee moved to Memphis, Tennessee, and became a successful restauranteur. Regrettably, he also started using—and sharing—ecstasy at parties and was charged in 2009 with possession of ecstasy with intent to distribute under 21 U.S.C. § 841(a)(1).

Because the evidence against Mr. Lee was considered quite strong, his attorney advised him to plead guilty in exchange for a shorter sentence. The attorney assured Mr. Lee that the plea would not subject him to deportation, but that advice was wrong. Possession of ecstasy with intent to distribute is an aggravated felony that results in mandatory and permanent deportation. See 8 U.S.C. §§ 1101(a)(43)(B), 1227 (a)(2)(A)(iii); 1182(a)(9)(A)(i).

Upon learning of this consequence, Mr. Lee moved to vacate his conviction and sentence under 28 U.S.C. § 2255, claiming ineffective assistance of counsel. The government concedes that Mr. Lee's attorney provided deficient performance, the first part of the familiar two-part test under *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). The question is whether Mr. Lee can demonstrate prejudice under the second part of *Strickland* where he is deemed to be facing strong evidence of guilt. App. 3a.

As the Sixth Circuit panel noted, there is a "growing circuit split" over the answer to that question. App. 5a. The panel identified the Second, Fourth, Fifth, and Sixth Circuits as all holding that a defendant in Mr. Lee's position is not entitled to relief. App. 4a (citing *Pilla* v. *United States*, 668 F.3d 368, 373 (6th Cir. 2012); *Haddad* v. *United States*,

486 F. App'x. 517, 521–22 (6th Cir. 2012); *Kovacs* v. *United States*, 744 F.3d 44, 52–53 (2d Cir. 2014); *United States* v. *Akinsade*, 686 F.3d 248, 255–56 (4th Cir. 2012); *United States* v. *Kayode*, 777 F.3d 719, 724–29 (5th Cir. 2014)).

Conversely, said the panel, the Third, Seventh, Ninth, and Eleventh Circuits have all "reached the opposite conclusion." App. 4a (citing *United States* v. *Orocio*, 645 F.3d 630, 643–46 (3d Cir. 2011), *abrogated on other grounds by Chaidez* v. *United States*, 133 S. Ct. 1103 (2013); *DeBartolo* v. *United States*, 790 F.3d 775, 777–80 (7th Cir. 2015); *United States* v. *Rodriguez-Vega*, 797 F.3d 781, 789–90 (9th Cir. 2015); *Hernandez* v. *United States*, 778 F.3d 1230, 1234 (11th Cir. 2015)).

Because the Sixth Circuit had previously placed itself on the side of the government, the panel lacked the authority "to change camps." App. 4a. But the panel noted the incongruity of the result: "It is unclear to us why it is in our national interests—much less the interests of justice—to exile a productive member of our society to a country he hasn't lived in since childhood for committing a relatively small-time drug offense." App. 10a.

Regardless of which circuit "camp" is correct, certiorari is warranted. It cannot be the case that ineffective assistance of counsel in some circuits results in mandatory and permanent deportation, while the exact same conduct in other circuits results in relief and an opportunity to negotiate a new plea or go to trial. Because only this Court can resolve the mature circuit conflict with respect to the recurring issue presented, the petition for certiorari should be granted.

STATEMENT

A. Ineffective assistance in the context of a deportable offense

A defendant's ineffective-assistance claim is evaluated using a two-part test: (1) whether the attorney performance was deficient; and (2) if so, whether the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. To prevail on the second part of the test in the context of a guilty plea, a defendant must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985). This test is objective; a defendant who pled guilty because of ineffective assistance "must convince the court that a decision to reject the plea bargain would have been *rational under the circumstances*." *Padilla* v. *Kentucky*, 559 U.S. 356, 372 (2010) (emphasis added).

In *Padilla*, this Court considered the ineffective-assistance claim of a defendant whose guilty plea likewise subjected him to deportation. The Court concluded that the "weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." *Id.* at 367. "[W]hen the deportation consequence is truly clear, . . . the duty to give correct advice is equally clear." *Id.* at 369. Because Mr. Padilla satisfied *Strickland*'s ineffective-assistance prong, the Court remanded the case for the lower courts to consider the prejudice prong. *Id.* In sum, *Padilla* stands for the proposition that the Sixth Amendment requires an attorney to inform his criminal-defendant client about the risk of deportation flowing from a guilty plea.

This case is different than *Padilla*. As explained below, rather than claim his attorney failed to advise, Mr. Lee claims his attorney affirmatively *misadvised* him that there would be no deportation consequences to his plea. And because the "government concedes that Lee has satisfied the first [ineffective-assistance] prong," the only question is whether Lee can satisfy the prejudice prong. App. 3a.

B. Mr. Jae Lee

Mr. Lee is a lawful permanent resident who emigrated to the U.S. from South Korea in 1982, when he was 13 years old. App. 48a. He was educated in the United States, and he has never returned to the country of his birth. *Ibid.* For more than 20 years, Mr. Lee has lived in Memphis, Tennessee, owning and operating two restaurants. *Ibid.* Mr. Lee's mother and father are U.S. citizens living in Brooklyn, New York, who naturalized after Mr. Lee was an adult. *Ibid.* Mr. Lee's parents are elderly, and he is "the only child left to care for them." *Ibid.*

C. The indictment

Although a successful businessman with no previous criminal convictions, Mr. Lee had a problem with the drug ecstasy, a recreational drug that induces euphoria. Acting on a tip, law enforcement officers executed a search warrant at Mr. Lee's home on January 6, 2009, and recovered 88 ecstasy pills. App. 47a. Mr. Lee was charged with possessing ecstasy with the intent to distribute in violation of 21 U.S.C. § 841(a). *Ibid.* Conviction of this charge is an "aggravated felony" that results in mandatory and permanent deportation. 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii); 1182(a)(9)(A)(i).

D. Mr. Lee's legal representation

Larry E. Fitzgerald represented Mr. Lee, who initially pled not guilty. App. 53a–54a. At an evidentiary hearing, Mr. Fitzgerald testified that Mr. Lee's case was "a bad case to try" because there was no basis to attack the search of Mr. Lee's home, and the number of pills and other evidence undermined any defense that the ecstasy was all for Mr. Lee's personal use rather than distribution. App. 54a.

In Mr. Fitzgerald's discussions with Mr. Lee, Lee "repeatedly raised the question of deportation and indicated that it was his *main concern* in deciding how to proceed." App. 54a (emphasis added). Mr. Fitzgerald admitted that he did not practice immigration law and was unaware that a guilty plea to a violation of 21 U.S.C. § 841(a)(1) would result in automatic, mandatory deportation. *Ibid.* Mr. Fitzgerald did not consult with an immigration lawyer for assistance. App. 54a–55a.

In February 2009, Messrs. Lee and Fitzgerald participated in a proffer session with the government. App. 55a. In exchange for a guilty plea, the government agreed to deduct three points for acceptance of responsibility (which reduced Mr. Lee's offense level to 17), making the statutory safety valve applicable. *Ibid.* Mr. Fitzgerald told Mr. Lee he would likely face a three-to-five-year prison sentence if he went to trial, while the plea would result in a much shorter term or possibly even probation. *Ibid.* Mr. Fitzgerald also told Mr. Lee that the government was not seeking to deport Lee as part of the proposed plea agreement. *Ibid.*

Mr. Lee accepted the deal and pled guilty on June 17, 2009. App. 56a. Mr. Fitzgerald testified that Mr. Lee's belief that he would not be deported was "the key to [Lee's] decision." *Ibid.* Mr. Fitzgerald also testified that if Mr. Lee had known a guilty plea would result in deportation, Lee would probably have chosen to proceed to trial, and Mr. Fitzgerald would have advised him to do so. *Ibid.* Mr. Lee testified that he would absolutely have accepted the risk of going to trial if he had known a plea would result in his deportation. *Ibid.*

At the change-of-plea hearing, the court informed Mr. Lee that deportation and ineligibility for citizenship were potential consequences of his guilty plea, and the court asked Mr. Lee if those consequences affected his decision to plead guilty. App. 57a. Mr. Lee said yes, then answered "I don't understand" when asked how these consequences affected his decision. *Ibid.*

On September 28, 2009, Mr. Lee was sentenced to an incarceration period of 12 months and a day. App. 57a. Mr. Lee soon learned that the correctional facility where he had been assigned was a special one that "exclusively housed federal inmates" facing deportation after completing their sentences. App. 58a. A short time later, Mr. Lee's case manager told him that his conviction rendered him deportable, and that removal proceedings were imminent. *Ibid.* On September 24, 2010, Mr. Lee filed *pro se* his motion for habeas relief under 28 U.S.C. § 2255, claiming ineffective assistance of counsel. App. 58a–59a.

At the evidentiary hearing in the district court, Mr. Lee testified that Mr. Fitzgerald affirmatively advised him regarding the plea: "You have been in the United States so long they cannot deport you.

Even if they want to deport you, it's not in the plea agreement, the government cannot deport you." App. 56a. As the Magistrate found in her Report and Recommendation, the "testimonies of Lee and Fitzgerald were consistent that deportation was the determinative issue in Lee's decision whether to accept the plea deal." *Ibid.* Mr. Lee also testified that after he said "I don't understand" at the plea hearing, he looked to Mr. Fitzgerald for guidance. Fitzgerald assured Lee that he could disregard the deportation warning because it was only a "standard warning for non-U.S. citizen[s]." App. 57a.

E. Proceedings below

At the time of Mr. Lee's evidentiary hearing in this case, there was a circuit split as to whether this Court's decision in *Padilla*, 559 U.S. 356, applied retroactively. Proceedings were stayed when this Court granted certiorari to answer that question, and on February 20, 2013, this Court held in *Chaidez* v. *United States*, 133 S. Ct. 1103 (2013), that *Padilla* did not apply retroactively to cases like Mr. Lee's that were on collateral review at the time of the decision.

Mr. Lee acknowledges that *Chaidez* forecloses his ability to rely on *Padilla* to vacate his conviction in this case. But he contends that his plea should still be set aside and his conviction vacated based on Mr. Fitzgerald's affirmative *mis*advice regarding the deportation consequences of the plea. The lower courts in this case have all agreed that *Chaidez* does not bar Mr. Lee from claiming affirmative misadvice, thus framing the question as whether Mr. Lee can satisfy the two-part test for showing ineffective assistance under *Strickland*, 446 U.S. 668.

In the district court, the Magistrate concluded that Mr. Lee satisfied the deficient-performance prong because Mr. Fitzgerald "affirmatively misadvised Lee as to the immigration consequences of pleading guilty to the drug-trafficking crime for which Lee was indicted." App. 73a. As for the prejudice prong, the government argued that going to trial would not have been rational given the overwhelming evidence of Mr. Lee's guilt. This was in contrast to the government's position in an earlier pleading, when the government conceded that Mr. Fitzgerald's deficiency "prejudiced the petition" because Mr. Lee "would not have pleaded guilty but insisted on going to trial" had he understood the deportation consequences of a plea. App. 73a. Mr. Lee contended that "his life-bonding ties are in the United States," and he "had nothing to lose by going to trial if the alternative was to be deported," because he no longer had any connection to South Korea. App. 75a.

The Magistrate acknowledged that the prejudice test is objective, not subjective, and that "a prediction of the likely outcome at trial is frequently dispositive of the inquiry." App. 75a (citation omitted). But the Magistrate concluded that Mr. Lee had established prejudice because if he had known that a plea would result in mandatory deportation, "*it would have been [objectively] rational for him to choose to go to trial*, whatever the likelihood of success and even though he might face one to five years greater a sentence than if he had pled guilty, because under the circumstances, deportation was, objectively, at least as undesirable as any prison sentence." App. 76a (emphasis added). The Magistrate recommended granting Mr. Lee's habeas petition.

The government objected to the Report and Recommendation, which the district court adopted and rejected in part, ultimately denying Mr. Lee's § 2255 motion. The court said that although the Report and Recommendation purported to apply an objective standard, its prejudice analysis, focusing on Mr. Lee's desire to avoid deportation, was subjective. "The proper focus under an objective standard," said the court, "is on whether a reasonable defendant in Lee's situation would have accepted the plea offer and changed his plea to guilty." App. 46a. "In light of the overwhelming evidence of Lee's guilt, a decision to take the case to trial would have almost certainly resulted in a guilty verdict, a significantly longer prison sentence, and subsequent deportation." *Ibid.* The district court certified the issue for appeal.

The Sixth Circuit affirmed. It began its analysis by noting Mr. Fitzgerald's erroneous advice and the government's concession that Mr. Lee satisfied the deficient-performance prong of the *Strickland* test. Turning to the prejudice test, the court noted that whether Mr. Lee satisfied the standard was "not immediately obvious," App. 3a, because:

> On the one hand, the district court's conclusion that the evidence of guilt was "overwhelming" is not clearly erroneous, and deportation would have followed just as readily from a jury conviction as from a guilty plea. . . . On the other hand, . . . we do not doubt Lee's contention that many defendants in his position, had they received accurate advice from counsel, would have decided to risk a longer prison sentence in order to take their chances at trial, slim though they were. [App. 3a–4a.]

Asking whether it would be "rational" to reject a plea that would result in deportation where the evidence of guilt was strong, the Sixth Circuit noted that four circuits have said no: "being denied the chance to throw 'a Hail Mary' at trial does not by itself amount to prejudice." App. 4a (citing *Pilla* v. *United States*, 668 F.3d 368, 373 (6th Cir. 2012); *Haddad* v. *United States*, 486 F. App'x. 517, 521–22 (6th Cir. 2012); *Kovacs* v. *United States*, 744 F.3d 44, 52–53 (2d Cir. 2014); *United States* v. *Akinsade*, 686 F.3d 248, 255–56 (4th Cir. 2012); *United States* v. *Kayode*, 777 F.3d 719, 724–29 (5th Cir. 2014)). (The ultimate holdings in *Kovacs* and *Akinsade* actually went the other way.)

But the court acknowledged that four other circuits (actually six, including *Kovacs* and *Akinsade*) "have reached the opposite conclusion." App. 4a (citing *United States* v. *Orocio*, 645 F.3d 630, 643–46 (3d Cir. 2011), *abrogated on other grounds by Chaidez* v. *United States*, 133 S. Ct. 1103 (2013); *DeBartolo* v. *United States*, 790 F.3d 775, 777–80 (7th Cir. 2015); *United States* v. *Rodriguez-Vega*, 797 F.3d 781, 789–90 (9th Cir. 2015); *Hernandez* v. *United States*, 778 F.3d 1230, 1234 (11th Cir. 2015)).

Bound by the decision in *Pilla*, the panel noted it had no ability "to change camps." App. 4a. But "given the growing circuit split," the court elaborated on the bases for the disagreement. See App. 5a–10a.

The panel emphasized that its conclusion "should not be read as endorsing Lee's impending deportation." App. 10a. "It is unclear to us why it is in our national interests—much less the interests of justice—to exile a productive member of our society to a country he hasn't live in since childhood for committing a relatively small-time drug offense." *Ibid.*

REASONS FOR GRANTING THE PETITION

I. The Court should grant the petition to resolve a deep and mature circuit conflict.

Is it always irrational for a defendant facing strong evidence of guilt on a deportable offense to exercise his right to go to trial? Two circuits say "no"; six circuits say "yes." Until this Court establishes a uniform rule, whether a defendant in Mr. Lee's position receives his constitutional right to counsel depends entirely on geography.

1. The Fifth and Sixth Circuits have held that strong evidence of guilt precludes a defendant from establishing *Strickland* prejudice in the context of a defendant's plea to a deportable offense based on ineffective assistance. In *Pilla*, 668 F.3d 368, a citizen and native of India pled guilty to making false statements based on her lawyer's erroneous advice that she would not be deported for the offense. *Id.* at 371. After she was ordered removed in an immigration proceeding based on the conviction, she petitioned for a writ of *coram nobis* based on ineffective assistance of counsel. The Sixth Circuit held Pilla could not prove prejudice because she "faced overwhelming evidence of her guilt." *Id.* at 373. Had she gone to trial, she would have still been convicted and subject to deportation; the only consequence of her attorney's bad advice "is that she got a shorter prison term than otherwise." *Id.*

The Fifth Circuit reached the same conclusion in *Kayode*, 777 F.3d at 724–29. Two years after becoming a naturalized citizen, Kayode pled guilty to mail fraud, aggravated identity theft, and unlawful procurement of naturalization after his lawyers failed to

warn him that he could lose his citizenship and be deported for those offenses. *Id.* at 723. Kayode attacked his plea and conviction by motion pursuant to 28 U.S.C. § 2255 on the ground of ineffective assistance of counsel. The Fifth Circuit concluded that there was a material question of fact whether Kayode's counsel's assistance was deficient under *Padilla*. *Id.* at 723–24. But it held that Kayode could not establish *Strickland* prejudice because "there was 'overwhelming evidence against Kayode.' " *Id.* at 725–26. The Fifth Circuit agreed that Kayode had substantial connections to the United States, which made it "more reasonable for someone in Kayode's circumstances to risk going to trial rather than face deportation." *Id.* at 727. Yet, because Kayode almost certainly would have been convicted (and deported) had he gone to trial, the Fifth Circuit thought it "unlikely that a rational person in Kayode's position would have proceeded to trial." *Ibid.*

Judge Dennis dissented: "A mentally competent defendant . . . has the constitutional right to insist on going to trial rather than pleading guilty, even if the strength of the prosecution's evidence may make that insistence seem irrational." *Id.* at 737 (Dennis, J., dissenting) (quoting *Gonzalez* v. *United States*, 722 F.3d 118, 132–33 (2d Cir. 2013)). As a result, Kayode did not need to "go so far as demonstrating that he necessarily would have been acquitted based on his defense to the charges." *Ibid.* "Rather, he must establish that 'a decision to reject the plea bargain would have been rational under the circumstances.' " *Ibid.* (quoting *Padilla*, 559 U.S. at 372). Judge Dennis would have reversed and remanded for an evidentiary hearing. *Id.* at 738.

2. The Second, Third, Fourth, Seventh, Ninth, and Eleventh Circuits have concluded that defendants like Mr. Lee can show prejudice. The Sixth Circuit panel in the present case suggested that two of these circuit decisions—the Fourth Circuit's decision in *Akinsade*, 686 F.3d at 255–56, and the Second Circuit's decision in *Kovacs*, 744 F.3d 44—supported its decision against Mr. Lee. See App. 4a. In fact, those circuits' decisions support Mr. Lee, and decisions of the Third, Seventh, Ninth, and Eleventh Circuits even more so.

The facts in *Akinsade* are similar to those of Mr. Lee's case. Akinsade, a Nigerian citizen, came to the United States legally at the age of seven and became a lawful permanent resident in May 2000. 686 F.3d at 250. But in 1999, when Akinsade was 19 years old and working as a bank teller, he cashed checks for several acquaintances who were not payees on the checks, and he deposited some of the proceeds into his own account. *Ibid.* He pled guilty to embezzlement-by-bank-employee after his lawyer told him, incorrectly, that he could not be deported for that offense. *Ibid.* Nine years later, however, he was charged with removability as an aggravated felon, and petitioned for a writ of *coram nobis*. *Id.* at 251.

Despite overwhelming evidence of Akinsade's guilt—he reported his actions to the bank and agreed to cooperate with the FBI, *id.* at 250—the Fourth Circuit held that he had established *Strickland* prejudice. *Id.* at 235–55. The Fourth Circuit relied in part on a previous, unpublished opinion finding *Strickland* prejudice where a defendant, misadvised by counsel about deportation consequences, had "significant familial ties to the United States and thus would reasonably risk going to trial instead of

pleading guilty and facing certain deportation." *Id.* at 255 (citing *United States* v. *Gajendragadkar*, 1998 WL 352886, at *2 (4th Cir. June 3, 1998)). The Fourth Circuit granted Akinsade's petition.

The Second Circuit's decision in *Kovacs*, 744 F.3d at 52–53, also supports Mr. Lee's position. Kovacs, an Australian national but permanent U.S. resident, founded a company that lost $250,000 in a burglary. An insurance adjustor persuaded Kovacs to inflate the amount of the claim, which was submitted to and paid by the insurance company. The government charged Kovacs with wire fraud and conspiracy, and Kovacs instructed his lawyer "to negotiate a plea that would have no immigration consequences." *Id.* at 48. The lawyer mistakenly advised Kovacs to plead guilty because doing so would have no immigration consequences. Kovacs served his sentence and received an early termination of his probation. But three years later, immigration officials directed him to appear for possible deportation.

Kovacs petitioned for *coram nobis* relief and focused on the fact that he could have negotiated an alternate plea, one that would not have resulted in deportation. The Second Circuit agreed with Kovacs: "a defense lawyer's incorrect advice about the immigration consequences of a plea is prejudicial if it is shown that, but for counsel's unprofessional errors, there was a reasonable probability that the petitioner could have negotiated a plea that did not impact immigration status or that he would have litigated an available defense." *Id.* at 52.

The Second and Fourth Circuits' decisions are aligned with decisions of the Third, Seventh, Ninth, and Eleventh Circuits. The strongest support for Mr. Lee's position is the Seventh Circuit's decision in

DeBartolo, 790 F.3d 775 (Posner, J.). DeBartolo immigrated to the U.S. from Italy with his family as a child but, like Mr. Lee, never applied for U.S. citizenship. Over the next 48 years, he developed deep familial and cultural ties to the United States. Charged with possessing with intent to distribute more than 100 marijuana plants, DeBartolo cooperated with the government and pled guilty, resulting in a sentence of only 25 months. "[U]nbeknownst to DeBartolo, and also it seems to his lawyer, the prosecutors, and the judge, his conviction of the drug offense made him deportable." *Id.* at 777. When removal proceedings were instituted against him, DeBartolo filed a motion under 28 U.S.C. § 2255(a).

Although DeBartolo's counsel's advice was deficient under *Padilla*, the government argued—and the district court had agreed—"that the evidence [wa]s so stacked against DeBartolo that he would not in fact have insisted on a trial even if he'd known he'd be deported as a consequence of pleading guilty and therefore of being convicted." 790 F.3d at 778. The Seventh Circuit noted that "[j]udges and prosecutors should hesitate to speculate on what a defendant would have done in changed circumstances." *Ibid.* The court then recognized that sometimes juries acquit criminal defendants even in the face of overwhelming evidence: "in light of the growing movement to legalize the sale of marijuana and the absence of any suggestion of guns or violence associated with DeBartolo's criminal activity, a jury might have thought his offense trivial and either acquitted him or convicted him of some lesser offense," one "which would not have been a basis for mandatory deportation." *Id.* at 779. "We don't condone jury nullification," but "a criminal defendant cannot be denied the right to a trial, and forced to

plead guilty, because he has no sturdy legal leg to stand on but thinks he has a chance that the jury will acquit him even if it thinks he's guilty." *Ibid.*

Like the Second Circuit in *Kovacs*, the Seventh Circuit also recognized that DeBartolo "could have tried to negotiate a different plea deal for an offense that does not make deportation mandatory." 790 F.3d at 779. DeBartolo "might even have preferred a lengthy prison term in the United States to a shorter prison term that would lead more quickly to deportation, because the lengthy prison term would at least keep him in the same country as his family, facilitating frequent visits by family members, which is important to prisoners." *Id.* at 780.

Finally, the Seventh Circuit considered the broader context: "the disarray in the enforcement of U.S. immigration law" and the "constant calls for reform of the laws themselves and of the methods of enforcing them." 790 F.3d at 780. Even if convicted following a trial, "DeBartolo may not be deported when he is released from prison." *Ibid.* "His subjecting himself to a trial rather than remaining in Italy and trying to acclimate himself to an alien culture far from his large family is a risky venture but not an irrational or even a reckless one," even at the time he would have been forced to make that decision. *Ibid.* "The probability that he will come out ahead by taking that course may be small, but it is not trivial. He is entitled to roll the dice." *Ibid.* The Seventh Circuit granted the petition. *Ibid.*

The Third Circuit reached the same conclusion in *Orocio*, 645 F.3d 630, *abrogated on other grounds by Chaidez*, 133 S. Ct. 1103. Orocio, a Philippine citizen, became a lawful permanent U.S. resident in 1997 but was arrested for drug trafficking in 2003. He pled

guilty, but his attorney failed to advise him of the deportation consequences. When Orocio was placed in removal proceedings after he completed his sentence, he filed a petition for *coram nobis*. The Third Circuit, applying *Padilla* retroactively, concluded that Orocio had satisfied the deficient-performance prong of *Strickland* and thus focused on whether Orocio could prove prejudice.

The district court had concluded there was no prejudice because of the strength of the government's evidence: "Orocio had not shown that he would have been acquitted, had he gone to trial." 645 F.3d at 643. The Third Circuit rejected that standard, noting that this Court "requires only that a defendant could have rationally gone to trial in the first place, and it has never required an affirmative demonstration of likely acquittal at such a trial as the *sine qua non* of prejudice." *Ibid.* (citation omitted). For "the alien defendant most concerned with remaining in the United States, especially a legal permanent resident, it is not at all unreasonable to go to trial and risk a ten-year sentence and guaranteed removal, but with the chance of acquittal and the right to remain in the United States." *Id.* at 645. Orocio "rationally could have been more concerned about a near-certainty of multiple decades of banishment from the United States than the possibility of a single decade in prison." *Ibid.* Accordingly, the Third Circuit reversed and remanded for an evidentiary hearing.

The Ninth Circuit followed suit in *Rodriguez-Vega*, 797 F.3d 781, yet another instance of counsel failing to adequately advise a defendant of deportation consequences following a plea. Elizabeth Rodriguez-Vega was a Mexican citizen who came to the United States with her family at age 12 and who

had been a lawful permanent resident for 22 years before being charged with a felony for attempted transportation of illegal aliens. Following her plea, Rodriguez-Vega was issued a Notice to Appear alleging that she was removable, and she filed a petition to vacate her conviction under 28 U.S.C. § 2255 based on ineffective assistance.

The Ninth Circuit held that Rodriguez-Vega satisfied *Strickland*'s performance prong under *Padilla* and then turned to prejudice. The Ninth Circuit concluded that Rodriguez-Vega could demonstrate prejudice for either of two reasons. First, she could have negotiated a plea bargain that would not result in her removal. 797 F.3d at 788–89. Second, it "is often reasonable for a non-citizen facing nearly automatic removal to turn down a plea and go to trial risking a longer prison term, rather than to plead guilty to an offense rendering her removal virtually certain." *Id.* at 789. This was so even if Rodriguez-Vega had known "removal was virtually certain" if she went to trial. *Id.* at 790.

Finally, in *Hernandez*, 778 F.3d 1230, a Cuban citizen filed a 28 U.S.C. § 2255 petition to vacate his sentence after pleading guilty to marijuana possession with intent to distribute subjected him to deportation, despite counsel having advised that deportation was not a substantial risk of a plea. That advice was deficient under *Padilla*. Despite sufficient evidence of guilt to result in a grand jury indictment, the Eleventh Circuit held that Hernandez demonstrated prejudice so as to warrant an evidentiary hearing. Hernandez "could have rationally chosen to risk longer incarceration for the chance to avoid deportation." *Id.* at 1234.

The cases cited by the Sixth Circuit panel in its opinion below support that court's observation that there is a "growing circuit split" over the question presented here, App. 5a, though by Mr. Lee's count that split runs 6-2 in his favor rather than dividing equally 4-4. The petition should be granted so this Court can restore uniformity among the circuits and equal treatment to all defendants in Mr. Lee's situation, regardless of the circuit in which they might be prosecuted.

II. The Court should grant the petition and reverse because it would not have been irrational for Mr. Lee to reject the plea agreement had he been properly advised of the deportation consequences.

The Circuits taking the majority position explain at great length the numerous reasons why it would have been objectively rational for Mr. Lee to reject the proffered plea deal had he known that accepting it would have resulted in his permanent deportation.

First, Mr. Lee could have attempted to negotiate for an outcome that would not have carried automatic deportation sanctions. For example, the United States Attorney's Pretrial Diversion Program is "an alternative to prosecution that diverts certain offenders from traditional criminal justice processing into a program of supervision and services" that the U.S. Probation Service administers. U.S. Attorney's Manual § 9-22.010, available at http://goo.gl/1SE27e. "In the majority of cases, offenders are diverted at the pre-charge stage," and those "who successfully complete the program will not be charged or, if charged, will have the charges against them dismissed." *Id.* Mr. Lee satisfied the eligibility criteria

for this program. *Id.* § 9-22.100 (not a case that should be diverted to the State for prosecution; no prior felony convictions; not a public official accused of violating the public trust; not accused of an offense related to national security or foreign affairs).

Mr. Lee also could have bargained for a plea to a non-aggravated felony drug or other offense. A lawful permanent resident like Mr. Lee (permanent resident for at least five years who has resided in the U.S. continuously for seven years) can apply for cancellation of removal proceedings before an immigration court, but only if he has not been convicted of an aggravated felony. 8 U.S.C. § 1229b(a). A number of the felonies listed in the Immigration and Nationality Act are "aggravated" only if the sentence exceeded one year. See 8 U.S.C. § 1101(a)(43). And Title 18 of the U.S. Code is replete with misdemeanor offenses that could be substituted for a felony controlled-substance crime.

Prosecutors will also sometimes substitute for a controlled-substance charge a misdemeanor charge under the Internal Revenue Code. Simple failure to pay any federal tax is a misdemeanor offense. 26 U.S.C. § 7203. So is failure to keep records or supply information. *Id.* Other misdemeanor offenses include providing "false or fraudulent" information in connection with withholding taxes or withheld-tax exemptions. 26 U.S.C. §§ 7204, 7205. In sum, there were ample opportunities for Mr. Lee and his attorney to negotiate for a plea agreement that would not have resulted automatically in Mr. Lee's deportation.

Second, Mr. Lee could have simply taken his chances at trial. For "the alien defendant most concerned with remaining in the United States, especially a legal permanent resident, it is not at all unreasonable to go to trial and risk a . . . sentence and guaranteed removal, but with the chance of acquittal and the right to remain in the United States." *Orocio*, 645 F.3d at 645. "[A] criminal defendant cannot be denied the right to a trial, and forced to plead guilty, because he has no sturdy legal leg to stand on but thinks he has a chance that the jury will acquit him even if it thinks he's guilty." *DeBartolo*, 790 F.3d at 779.

Third, Mr. Lee could have gone to trial hoping that, at the conclusion of his sentence, "the disarray in the enforcement of U.S. immigration law" and the "constant calls for reform of the laws themselves and of the methods of enforcing them" would result in a change in federal policy such that he would not be deported. *Id.* at 780.

Finally, it would not have been irrational for Mr. Lee to reject a plea and go to trial if the objective evidence showed that serving a lengthy sentence in the United States would keep him in close physical proximity to his family and friends, especially hi[illegible] aging parents. See *ibid.* (DeBartolo "might even have preferred a lengthy prison term in the United States to a shorter prison term that would lead more quickly to deportation, because the lengthy prison term would at least keep him in the same country as his family, facilitating frequent visits by family members, which is important to prisoners.").

These rationales for rejecting the offered plea are not after-the-fact justifications based on Mr. Lee's subjective mindset. They are all rational reasons for changing course based on the objective circumstances—circumstances that were mirrored in the many cases cited above. Moreover, allowing a defendant in Mr. Lee's position to withdraw a plea has the ameliorative effect of not placing trial-court judges in the difficult position of deciding how meritorious a defendant's defense is as part of the prejudice analysis. The petition should be granted, and this Court should adopt the analyses of the Second, Third, Fourth, Seventh, Ninth, and Eleventh Circuits.

III. The question presented is of national importance and requires prompt resolution, and this case is an ideal vehicle for resolving that question.

The numerous conflicting circuit decisions show that the issue presented is recurring and creating unnecessary district- and circuit-court litigation. The Court should grant the petition and resolve that conflict now.

First, despite this Court's decision in *Padilla*, a shocking number of lawyers fail to advise or wrongly advise their clients about the deportation consequences of a guilty plea. See generally *Immigration Law & Crimes* § 4:4 (2016). As a result, numerous circuits have been forced to address the question presented. The Sixth Circuit alone has faced the issue three times just since 2012, in *Pilla*, the present case, and in *Haddad*, 486 F. App'x. at 521–22.

Second, the circuit split is deep and mature, with six circuits on one side of the divide, two on the other. It is highly unlikely that subsequent circuit decisions or *en banc* proceedings will resolve this conflict, or provide useful additional analysis. The Sixth Circuit panel in this very case, for example, had the opportunity to join the circuit majority by advocating for *en banc* review of its decision, but instead built on and reaffirmed the *Pilla* analysis.

Third, further delay in resolving the conflict harms the government, defendants, and the justice system. If the Sixth Circuit is correct, then six other circuits have adopted the wrong rule and are needlessly undermining the immigration system by allowing noncitizen defendants to withdraw guilty pleas. If the six circuits in the majority are correct, then noncitizen defendants in the Fourth and Sixth Circuits are being unconstitutionally denied an opportunity to withdraw their pleas. Either way, the justice system is producing widely divergent results for similarly situated defendants.

Fourth, this case is an ideal vehicle to resolve the question presented. There are no contested material facts, and the United States concedes that Mr. Lee's attorney provided ineffective assistance. The sole issue left for this Court to decide is whether it is always irrational for a defendant facing strong evidence of guilt to reject a plea when a conviction will result in mandatory and permanent deportation.

Finally, this Court's intervention now is required to vindicate the Sixth Amendment's guaranty of effective assistance of counsel. This Court's review is justified if there is even a possibility lower courts are unconstitutionally denying plea withdrawals and, as a result, causing lawful permanent residents to be forever banished from the United States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)
File Name: 16a0135p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAE LEE,

Petitioner-Appellant,

v. No. 14-5369

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Western District of Tennessee at Memphis.

Nos. 2:09-cr-20011-1; 2:10-cv-02698—John Thomas Fowlkes, Jr., District Judge.

Argued: January 28, 2016

Decided and Filed: June 8, 2016

Before: NORRIS, BATCHELDER, and SUTTON, Circuit Judges.

COUNSEL

ARGUED: Patrick T. McNally, WEATHERLY, MCNALLY & DIXON, PLC, Nashville, Tennessee, for Appellant. Kevin P. Whitmore, UNITED STATES ATTORNEY'S OFFICE, Memphis, Tennessee, for Appellee. **ON BRIEF:** Patrick T. McNally, WEATHERLY, MCNALLY & DIXON, PLC,

Nashville, Tennessee, for Appellant. Kevin P. Whitmore, UNITED STATES ATTORNEY'S OFFICE, Memphis, Tennessee, for Appellee.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Jae Lee, now 47 years old, moved to the United States from South Korea with his family in 1982 and has lived here legally ever since. After completing high school in New York, he relocated to Memphis, Tennessee, where he became a successful restaurateur. He also became a small-time drug dealer, and, in 2009, following a sting operation, he was charged with possession of ecstasy with intent to distribute in violation of 21 U.S.C. § 841(a)(1).

The case against him was very strong. A government witness was prepared to testify that he had purchased ecstasy from Lee on a number of occasions, dozens of pills were discovered during a lawful search of Lee's home, and Lee himself admitted not only that he had possessed ecstasy, but also that he had distributed the drug to his friends. In light of this, Lee's trial attorney advised him to plead guilty in exchange for a lighter sentence.

Here's the wrinkle: even though he has lived in the United States for decades, Lee, unlike his parents, never became an American citizen, and though he did eventually plead guilty, he did so only after his lawyer assured him that he would not be subject to deportation—"removal," in the argot of contemporary immigration law. This advice was wrong: possession of ecstasy with intent to distribute is an "aggravated felony," rendering Lee deportable. *See* 8

U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii). Lee understandably does not want to be deported, and he filed a motion to vacate his conviction and sentence under 28 U.S.C. § 2255, contending that he received ineffective assistance of counsel.

We evaluate claims of ineffective assistance of counsel using the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984): (1) Was the attorney's performance deficient? And (2) did the deficient performance prejudice the defense? The government concedes that Lee has satisfied the first prong, so the only question we have to decide on this appeal is whether Lee has met the high bar of demonstrating prejudice. *See id.* at 693–95. To prevail, he must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). "The test is objective, not subjective; and thus, 'to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'" *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010)).

Whether Lee has satisfied this standard is not immediately obvious. On the one hand, the district court's conclusion that the evidence of guilt was "overwhelming" is not clearly erroneous, and deportation would have followed just as readily from a jury conviction as from a guilty plea. Thus, aside from the off chance of jury nullification or the like, Lee stood to gain nothing from going to trial but more prison time. On the other hand, for those such as Lee who have made this country their home for decades,

deportation is a very severe consequence, "the equivalent of banishment or exile," as the Supreme Court memorably put it. *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947). As a factual matter, we do not doubt Lee's contention that many defendants in his position, had they received accurate advice from counsel, would have decided to risk a longer prison sentence in order to take their chances at trial, slim though they were.

But would such a decision be "rational"? Several courts, including this circuit, have said "no": being denied the chance to throw "a Hail Mary" at trial does not by itself amount to prejudice. *See Pilla*, 668 F.3d at 373; *Haddad v. United States*, 486 F. App'x 517, 521–22 (6th Cir. 2012); *see also, e.g.*, *Kovacs v. United States*, 744 F.3d 44, 52–53 (2d Cir. 2014); *United States v. Akinsade*, 686 F.3d 248, 255–56 (4th Cir. 2012); *United States v. Kayode*, 777 F.3d 719, 724–29 (5th Cir. 2014).

Others have reached the opposite conclusion. *See, e.g.*, *United States v. Orocio*, 645 F.3d 630, 643–46 (3d Cir. 2011), *abrogated on other grounds by Chaidez v. United States*, 133 S. Ct. 1103 (2013); *DeBartolo v. United States*, 790 F.3d 775, 777–80 (7th Cir. 2015); *United States v. Rodriguez-Vega*, 797 F.3d 781, 789–90 (9th Cir. 2015); *Hernandez v. United States*, 778 F.3d 1230, 1234 (11th Cir. 2015).

We have no ability, of course, as a panel, to change camps. And in that sense, this is a straightforward case. In *Pilla* we held that no rational defendant charged with a deportable offense and facing "overwhelming evidence" of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence. 668 F.3d at 373. Lee finds himself in precisely this position, and he must therefore lose.

But given the growing circuit split (which, as best we can tell, has gone unacknowledged), we think it worthwhile to explain why we are convinced that our approach is the right one and to set out the role that we believe deportation consequences should play in evaluating prejudice under *Strickland*.

We begin, however, by giving the other side its due. As the Seventh Circuit noted in *DeBartolo*, strong evidence of guilt does not strip a defendant of his right to a jury trial, nor does it guarantee a guilty verdict. 790 F.3d at 779. The second point is especially true for defendants such as Lee, since it is well documented that many jurors are willing to acquit those charged with a first-time, non-violent drug offense, despite evidence of guilt. *See id.* (quoting Lawrence D. Bobo & Victor Thompson, *Racialized Mass Incarceration: Poverty, Prejudice, and Punishment, in Doing Race: 21 Essays for the 21st Century* 343 (Hazel R. Markus & Paula Moya eds., 2010)).

This possibility, at least according to many of this nation's founders, is not a defect, but a feature of the jury system. *See, e.g.*, 2 John Adams, *The Works of John Adams* 254–55 (1850) ("It is not only [the juror's] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." (Diary Entry, February 12, 1771)). Indeed, the unreviewable power of juries to acquit, despite strong evidence of guilt, was perhaps the *central* reason why the right to a jury trial in criminal cases was enshrined in the Constitution. *See* Rachel E. Barkow, *Criminal Trials, in The Heritage Guide to the Constitution* 340, 340–41 (David F. Forte & Matthew Spalding, eds. 2nd ed. 2014). For the framers and ratifiers, the memory of

how King George III had prevented colonial juries from nullifying unpopular English laws by "expand-[ing] the jurisdiction of nonjury courts" was still fresh. *Id.* at 340. And one of the grievances listed in the Declaration of Independence was that the King had "depriv[ed] us in many cases, of the benefits of Trial by Jury." *Declaration of Independence* para. 20 (U.S. 1776). It is thus not surprising that nearly all commentators active during the time of the founding favored the inclusion in the new Constitution of the right to a jury trial. *See, e.g.*, *The Federalist No. 83*, at 432–33 (Alexander Hamilton) (The Gideon ed., George W. Carey & James McClellan eds., Liberty Fund 2001) ("The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury.").[1] By codifying the right to a jury trial in criminal cases, the Constitution secured a key role for "the People"—specifically, the people "of the State and district wherein the crime shall have been committed," U.S. Const. amend. VI—in the judicial process, providing an effective check on the ability of oppressive and distant legislators, overzealous prosecutors, and unfair judges to contravene local sentiment.

This attitude towards juries has long since fallen into disfavor, but the use of juries has not. Nor has it ceased to be true that, as G.K. Chesterton once noted, we rely on juries not because they are made up of legal experts, but precisely because they are

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[1] This high regard for juries dovetails with eighteenth-century jurists' dislike of guilty pleas. Blackstone, for example, said that courts were usually "very backward in receiving and recording" them and should usually see to it that they were withdrawn. 4 William Blackstone, *Commentaries* *329.

not. *See* G.K. Chesterton, *The Twelve Men*, *in Tremendous Trifles* 80, 86–87 (1909), *available at http://www.chesterton.org/twelve-men/*. As he put it,

> Our civilisation has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. [When it] wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things that I felt in the jury box.

Id.

We nevertheless respectfully disagree with our colleagues on the Seventh Circuit that jury nullification may be considered when evaluating whether a petitioner has shown *Strickland* prejudice. We reach this conclusion for the straightforward reason that *Strickland* itself has taken the matter out of our hands: "A defendant has no entitlement to the luck of a lawless decisionmaker." 466 U.S. at 695. And we must therefore exclude from our analysis "the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." *Id.* Such possibilities, real as they are, "are irrelevant to the prejudice inquiry" under *Strickland*. *Id.* Unfortunately for Lee, "the luck of the lawless decisionmaker" is all he has going for him. Nothing in the record suggests that he would have been acquitted at trial, *cf. Hill*, 474 U.S. at 59–60, or would have been able to obtain a conviction for an offense that did not require deportation, *cf. Missouri v. Frye*, 132 S. Ct. 1399, 1409–10 (2012); *Kovacs*, 744 F.3d at 51–52.

Similarly, while we recognize the possibility that the prosecutor might have agreed to allow Lee to

plead guilty to a non-deportable offense if his attorney had pursued the matter, this is sheer speculation. Again, there is nothing in the record before us indicating that such an attempt would have changed the ultimate outcome of Lee's case. *See Hill*, 474 U.S. at 59.

Lee, together with the courts that have reached the opposite conclusion, counters that deportation changes the calculus because "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *Orocio*, 645 F.3d at 645 (quoting *Padilla*, 559 U.S. at 368) (internal quotation marks and emphasis omitted; brackets in original). This statement is true enough. And we agree that a "reasonable" non-citizen charged with a deportation-triggering offense will, if properly advised, consider deportation consequences in deciding whether to plead guilty and might, as a result, be willing to go to trial even if he faces a low probability of success, one that might lead a citizen to accept a plea. This consideration is thus a "special circumstance[]" relevant to the prejudice inquiry. *Hill*, 474 U.S. at 60. But it does not follow from this that a decision to reject a plea deal that would trigger deportation consequences is *ipso facto* "rational under the circumstances" regardless of the merits of the defense.

To begin with, there is no way to square such a conclusion with *Strickland*'s admonition that courts may not consider jury nullification or happenstance when deciding whether a petitioner has demonstrated prejudice. Lee's reasoning, moreover, takes the quotation from *Padilla* out of context: when *Padilla* emphasized the importance of deportation consequences to the plea calculus, it did so in the

context of analyzing the deficient-performance prong, not the prejudice prong. This is significant because the Court declined to craft a deportation-specific prejudice rule to go along with its deportation-specific performance rule. Indeed, it declined to do so even though the claimant in that case, like Lee, had lived in the United States legally for decades and had alleged that "he would have insisted on going to trial if he had not received incorrect advice from his attorney." *Padilla*, 559 U.S. at 359. While this is much the same as the statements that other courts have held sufficient to show prejudice, *see, e.g.*, *Hernandez*, 778 F.3d at 1234, the Supreme Court not only declined to decide the point, but it also emphasized "the fact that it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong." 559 U.S. at 371 n.12. The Court had no reason to say this if Lee's approach is correct.

Indeed, that approach would elide the difficult task of showing prejudice entirely since it would provide those in Lee's position with a ready-made means of vacating their convictions *whenever* they can show that counsel failed to adequately explain deportation consequences. The government may find it harder to re-prosecute (and eventually to deport) given the lapse of time, and it may have less motivation to do so since the claimant will have already served a prison sentence. This would geld the "strong presumption" against ineffective-assistance claims, *Strickland*, 466 U.S. at 696, and it is out of step with the rule that prejudice requires showing a "substantial, not just conceivable," chance of a different result, *Harrington v. Richter*, 562 U.S. 86, 112 (2011). Further, if Lee is right, might not competent defense counsel decide in some cases that acting *incompe-*

tently is better? *Cf. DeBartolo*, 790 F.3d at 780. That possibility weighs against Lee's approach, as the Supreme Court has made clear that ineffective-assistance claims must not "threaten the integrity of the very adversary process the right to counsel is meant to serve." *Harrington*, 562 U.S. at 105.

In other words, the merits matter. And we therefore join the Second, Fourth, and Fifth Circuits in holding that a claimant's ties to the United States should be taken into account in evaluating, *alongside the legal merits*, whether counsel's bad advice caused prejudice. *See, e.g.*, *Kovacs*, 744 F.3d at 52; *Akinsade*, 686 F.3d at 255–56; *Kayode*, 777 F.3d at 725. The problem for Lee is that he has no *bona fide* defense, not even a weak one. Thus, despite his very strong ties to the United States, he cannot show prejudice.

In reaching this conclusion, we should not be read as endorsing Lee's impending deportation. It is unclear to us why it is in our national interests—much less the interests of justice—to exile a productive member of our society to a country he hasn't lived in since childhood for committing a relatively small-time drug offense. But our duty is neither to prosecute nor to pardon; it is simply to say "what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Having discharged that duty, we affirm the district court's denial of Lee's § 2255 motion to vacate his conviction and sentence.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

JAE LEE, Movant, v. UNITED STATES OF AMERICA, Respondent.	)	Case No. 2:10-cv-02698-JTF-dkv Case No. 2:09-cr-20011-BBD

ORDER ADOPTING IN PART AND REJECTING IN PART REPORT AND RECOMMENDATION, DENYING MOTION PURSUANT TO 28 U.S.C. § 2255 AND GRANTING A LIMITED CERTIFICATE OF APPEALABILITY

Before the Court is the amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("§ 2255 Motion") and the Report and Recommendation ("R&R") issued by United States Magistrate Judge Diane K. Vescovo (ECF No. 59). The Government filed its Objections to Report and Recommendation on August 27, 2013 (ECF No. 13), and Movant filed his Response to Government's Objections to Magistrate's Report and Recommendation on September 30, 2013 (ECF No. 68). For the reasons stated below, the Court ADOPTS the R&R in part and REJECTS it, in part, and DENIES the § 2255 Motion.

I. PROCEDURAL HISTORY

A. Case Number 09-20011

On January 28, 2009, a federal grand jury returned a single-count indictment charging Lee with possessing a mixture and substance containing a detectable amount of controlled 3,4-methylenedioxymethamphetamine, commonly known as "MDMA" and/or "ecstasy," on or about January 7, 2009, with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1).[1] The factual basis for this charge is stated in the presentence report ("PSR"):

> 6. The following information was gathered from a review of materials contained in the files of the United States Attorney, including the investigative reports of the Memphis Drug Enforcement Administration (DEA) Task Force.
>
> 7. According to the investigative file, a Confidential Informant (CI) advised agents that **Jae Lee**, whom he/she had known for the last twelve years, was involved in drug trafficking since 1999. The CI indicated that between January 2001 and December 2008, the CI had purchased approximately **200 Ecstasy (MDMA) pills** from **Lee**. The CI stated that all the transactions had occurred at **Lee's** residence. The CI provided the following, which is [a] list of the years and approximate number of purchases conducted by the CI with **Lee**. No exact dates or the amounts involved are available for the trans-

[1] Indictment, United States v. Lee, No. 09-20011-BBD (W.D. Tenn.), ECF No. 1.

actions which are as follows: 5 occasions in 2001; 5 occasions in 2002; 5 occasions in 2003; 5 occasions in 2004; 7 occasions in 2005; 5 occasions in 2006; 6 occasions in 2007; and 2 occasions in 2008. The CI advised agents that he/she purchased one ounce of hydroponic marijuana from **Lee** on two occasions for $350 an ounce.

8. The CI reported to the agents that he/she owed **Lee** $150 for an existing "drug debt" for which **Lee** had "fronted" to the CI. On December 2, 2008, the CI was provided $150 in official government funds and was instructed to meet with **Lee** and settle the debt. Agents conducting surveillance observed the CI proceed to **Lee's** residence, where he/she remained for approximately ten minutes. Agents later met with the CI, who informed that while in **Lee's** residence, the CI observed **Lee** packaging 15 Ecstasy tablets into a cellophane wrapper.

9. On December 11, 2008, agents provided the CI with $300 in official government funds to conduct a buy of approximately **15 Ecstasy pills** from **Lee**. The CI was outfitted with a recording device and was under surveillance of the agents during the transaction. The CI was observed to proceed to **Lee's** residence and conduct the transaction. **Lee** indicated to the CI that he was now charging $20 a pill instead of $15. **Lee** and the CI agreed on the $20 per pill price and made the exchange. Agents later met with the CI who provided the agents with the 15 Ecstasy pills purchased from **Lee**.

10. On January 6, 2009, DEA Task Force Officers and Agents executed a federal search warrant at the residence located at 8288 George Brett Drive, Memphis, Tennessee. Agents had to make forced entry into the residence where they located **Lee** and his girlfriend, Amy Chu, in the bedroom. Agents searched **Lee's** residence and located **$32,432** in U.S. Currency located in a blue bag next to the couch; **8 Ecstasy tablets** recovered from a cigarette box located in the book case in the dining room; **80 Ecstasy tablets** found in a plastic bag in the book case in the dining room; 3 Valium tablets recovered from a box hidden underneath the bed in the master bedroom; and a loaded Norinco, Model 90, serial #616901, 7.62 caliber rifle, loaded with 25 live rounds from the master bedroom closet.

11. The drug calculations are as follows:

200 Ecstasy Tablets (purchased from the CI from January 2001 to December 2008)
15 Ecstasy Tablets (controlled purchase by the CI on December 11, 2008)
88 Ecstasy Tablets (seized on January 7, 2009 at Lee's residence)
Total = 303 Ecstasy Tablets * 250 mg = 75,750 milligrams (75.75 grams)

75.75 grams of Ecstasy * 500 grams (marijuana equivalent) = 37,875 grams
Total = 37.87 kilograms of marijuana equivalent

> 12. It should be noted that the Valium tablets and the hydroponic marijuana did not affect the guideline calculations.

(PSR ¶¶ 6-12.)

On June 17, 2009, pursuant to a written plea agreement, Lee appeared before then-United States District Judge Bernice B. Donald to plead guilty to the sole count of the Indictment.[2] The Plea Agreement did not mention that, by pleading guilty, Lee would automatically be deported after service of his sentence. It also contained the following provision:

> This writing constitutes the entire Plea Agreement between the Defendant and the Government with respect to his plea of guilty. No additional promises, representations or inducements other than those referenced in this Plea Agreement have been made to the Defendant or to his attorney with regard to this Plea, and none will be made or entered into unless in writing and signed by all parties.

(Plea Agreement ¶ 6, id., ECF No. 21.)

During the plea colloquy, the following exchange occurred:

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[2] Min. Entry, United States v. Lee, No. 09-20011-BBD (W.D. Tenn.), ECF No. 20; Mem. of Plea Agreement ("Plea Agreement"), id., ECF No. 21; Guilty Plea Hr'g Tr, id. A copy of the transcript of the change of plea hearing is Exhibit 4 to the evidentiary hearing on the § 2255 Motion and is an exhibit to the original § 2255 Motion (Case No. 10-2698, ECF No. 1-1 at PageID 94-116).

Q. And are you a U.S. citizen?

A. No, Your Honor.

Q. Okay. A conviction on this charge then could result in your being deported. It could also affect your ability to attain the status of a United States citizen. If you do become a United States citizen, it could affect your rights to participate in certain federal benefits, such as student loans.

Does that affect at all your decision about whether you want to plead guilty or not?

A. Yes, Your Honor.

Q. Okay. How does it affect your decision?

A. I don't understand.

Q. Okay. Well, knowing those things do you still want to go forward and plead guilty?

A. Yes, Your Honor.[3]

Movant testified that nobody had made any promises to him that were not in the Plea Agreement.[4] He also accepted the factual basis for the guilty plea recited by the Government, including the statement that the quantity of drugs seized was consistent with distribution rather than personal use.[5]

At a sentencing hearing on September 28, 2009, Judge Donald adopted the PSR and sentenced Lee to a term of imprisonment of twelve months and one

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[3] Guilty Plea Hr'g Tr. 9-10.

[4] Id. at 13.

[5] Id. at 17.

day, to be followed by a three-year period of supervised release. Judge Donald also imposed a fine of $5000.[6] Judge Donald emphasized that the offense was serious despite the relatively small number of pills that were involved:

> As you and your attorney and the government has all recognized, this is a very . . . serious offense, and it's one that has been ongoing for some period of time. It was not simply one aberrant act, but apparently one time getting caught.
>
> And while we, you know, the number of pills that we are looking at is just under 300. There is nothing to suggest that that's the universe of pills that were involved in this ten year period.
>
> And I think it would be fool hardy to believe that the ten year term included only the three hundred.[7]

Judgment was entered on September 29, 2009.[8] A corrected judgment, which delayed service of the

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[6] Min. Entry, United States v. Lee, No. 09-20011 (W.D. Tenn.), ECF No. 25; Sentencing Hr'g Tr., id. A copy of the sentencing transcript is an exhibit to the original § 2255 Motion (Case No. 10-2698, ECF No. 1-1 at PageID 117-37).

Pursuant to § 2K1.1(c)(11) of the United States Sentencing Guidelines ("U.S.S.G."), the base offense level for a drug offense involving between 20 and 40 kilograms of marijuana equivalent is 18. Lee received a two-level enhancement for possession of a firearm, U.S.S.G. § 2D1.1(b)(1), and a three-level reduction for acceptance of responsibility, U.S.S.G. § 3E1.1, resulting in a total offense level of 17. Given his criminal history of I, the base offense level was 24-30 months. Movant did not qualify for the safety valve reduction pursuant to U.S.S.G. § 5C1.2, which was mentioned in ¶ 1 of the Plea Agreement, because of the presence of the firearm.

[7] Sentencing Hr'g Tr. 15-16.

sentence until after January 30, 2010, was entered on October 22, 2009.[9] Lee did not take a direct appeal.

B. Procedural History of Lee's § 2255 Motion

On September 24, 2010, Lee filed a *pro se* § 2255 Motion that argued that his trial counsel, Larry Fitzgerald, rendered ineffective assistance by

1. "not only failing to inform LEE that a collateral consequence of his pleading guilty would subject him to deportation, but actually *affirmatively misadvising* him that he would not be deported if he pleaded guilty";
2. "failing to conduct any pretrial investigation into possible defenses, evidence, witnesses, discovery or search warrant deficiencies, potential lesser offense options, and/or ensuring LEE received proper consideration for the undisclosed benefits the Government received as a result of his plea"; and
3. "confusing the Court at sentencing by misrepresenting LEE was a 'citizen of the United States,' when he was not, and thus, depriving the Court of the knowledge and consideration of a factor (the consequence of deportation) that is com-

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[Footnote continued from previous page]

[8] J., United States v. Lee, No. 09-20011-BBD (W.D. Tenn.), ECF No. 26.

[9] Corrected J., id., ECF No. 29.

> monly relied upon as part of a Court's sentencing discretion."

(ECF No. 1 at PageID 34.) On October 18, 2010, Lee filed an Emergency Motion for Order to Expedite Proceedings. (ECF No. 2.) In an order issued on October 19, 2010, Judge Donald directed Lee to submit an amended motion on the official form. (ECF No. 3.)

On October 28, 2010, Lee filed his amended § 2255 Motion, which asserted the same issues that were presented in the original § 2255 Motion. (ECF No. 5.) On November 2, 2010, Judge Donald denied the Motion to Expedite and directed the Government to respond to the § 2255 Motion. (ECF No. 7.) On November 22, 2010, the Government filed its Response of the United States to Defendant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 ("Answer"). (ECF No. 9.) Movant filed his Reply to Response of the United States Re: Motion Pursuant [to] 28 U.S.C. § 2255 ("Reply") on December 6, 2010. (ECF No. 10.)

On November 17, 2010, Movant filed an *Emergency* Motion to Bypass Referral to Magistrate, and Order Directing Government to Provide Response Via Facsimile. (ECF No. 8.) On December 8, 2010, Movant filed an *Emergency* Motion for: (1) Setting of Evidentiary Hearing and Order to Transport *Before* January 5, 2010 or, Alternatively, for Final Ruling and COA; and (2) for Production of Search Warrant and Audio Recordings. (ECF No. 11.) In an order issued on June 3, 2011, Judge Donald, *inter alia*, denied the motion for facsimile service as moot, denied the motion for discovery as unnecessary, granted the motion for an evidentiary hearing, and referred the matter to the Magistrate Judge for possible appointment of counsel to represent Lee at

the evidentiary hearing. (ECF No. 15.) The order also notified Movant that he "can bypass [the referral to the Magistrate Judge] by promptly notifying the Court that he does not request appointed counsel." (Id. at 3.) On July 19, 2011, an attorney filed a notice of appearance on Movant's behalf. (ECF No. 18.) On October 28, 2011, Movant filed his own factual affidavit in support of his § 2255 Motion. (ECF No. 22-1.)

An evidentiary hearing was set for November 1, 2011. (ECF No. 20.) Movant filed a Motion to Reschedule Hearing (ECF No. 21), which was granted. The hearing was rescheduled for December 13, 2011. (ECF No. 23.) The Government filed a Motion to Continue Hearing and represented that "[t]he defendant's attorney has no objections to the United States' request." (ECF No. 25.) On December 9, 2011, Judge Donald granted the motion to continue.

Because Judge Donald was confirmed as a judge on the Sixth Circuit Court of Appeals, the case was reassigned to United States District Judge Samuel H. Mays, Jr. on December 29, 2011. (ECF No. 27.) On January 5, 2012, Judge Mays referred the matter to United States Magistrate Judge Diane K. Vescovo to conduct an evidentiary hearing and prepare a report and recommendation. (ECF No. 28.)[10]

Magistrate Judge Vescovo conducted an evidentiary hearing on February 9, 2012. (ECF Nos. 33 & 56.) On March 9, 2012, Movant filed his Post-Hearing Brief in Support of Motion Pursuant to 28 U.S.C. § 2255. (ECF No. 37.) In that brief, Movant

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[10] The matter was subsequently reassigned to the undersigned judge on August 3, 2012.

argued that his attorney's "performance fell below the standard articulated in Padilla v. Kentucky." (Id. at 6.)[11] On April 16, 2012, the Government filed its Response of the United States to Petitioner's Post Hearing Brief in Support of Motion Pursuant to 28 U.S.C. § 2255. (ECF No. 40.) On June 11, 2012, Judge Mays issued an order staying the case pending the Supreme Court's decision in Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011), *cert. granted*, ___ U.S. ___, 132 S. Ct. 2101, 182 L. Ed. 2d 867 (2012) (No. 11-820), which was expected to address the retroactivity of Padilla. (ECF No. 46.)

On February 20, 2013, the Supreme Court issued its decision in Chaidez v. United States, ___ U.S. ___, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013), which held that the decision in Padilla was not retroactively applicable to cases on collateral review. On March 11, 2013, the parties filed a joint motion to lift the stay (ECF No. 48), which the Court granted on March 12, 2013 (ECF No. 49). On April 20, 2013, Movant filed his Second Post-Hearing Brief in Support of Motion Pursuant to 28 U.S.C. § 2255. (ECF No. 54.) In that filing, Movant argued that his conviction should be vacated because:

> (1) trial counsel affirmatively misadvised Mr. Lee that the government was not going to seek deportation, (2) trial counsel failed to defend Mr. Lee in that he failed to seek a non-deportable disposition because he operated under the erroneous assumption that government was not going to seek deporta-

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[11] Padilla v. Ky., 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

> tion despite that deportation was mandatory upon a conviction for this drug offense, and (3) trial counsel rendered constitutionally ineffective assistance of counsel where he was not aware of the reasonably foreseeable extension of law that trial counsel must provide non-citizen clients competent advice on immigration consequences once the Supreme Court granted the writ of certiorari in Padilla.

(Id. at 2.) On June 20, 2013, the Government filed its Response to Petitioner's Second Post-Hearing Brief in Support of Motion Pursuant to 28 U.S.C. § 2255. (ECF No. 58.)

On August 6, 2013, Magistrate Judge Vescovo issued her R&R, which recommended that Movant's § 2255 Motion be granted. (ECF No. 59.) Specifically, the R&R concluded that "Fitzgerald's representation of Lee was objectively unreasonable in that he affirmatively misadvised Lee as to the immigration consequences of pleading guilty to the drug-trafficking crime for which Lee was indicted." (Id. at 27.) The R&R also found that Lee was prejudiced by his attorney's erroneous advice. Although recognizing that the standard for assessing prejudice is objective rather than subjective, the R&R found that, had Lee known that he would have been deported as a collateral consequence of his guilty plea, he would have insisted on going to trial. (Id. at 29-31.)

On August 27, 2013, the Government filed its Objections to Report and Recommendations. (ECF No. 63.) On September 30, 2013, Movant filed his Response to Government's Objections to Magistrate's Report and Recommendation. (ECF No. 68.)

II. LEGAL STANDARDS

A. Standards for Evaluating § 2255 Motions

Pursuant to 28 U.S.C. § 2255(a),

> [a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A prisoner seeking relief under 28 U.S.C. § 2255 must allege either (1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid." Short v. United States, 471 F.3d 686, 691 (6th Cir. 2006) (internal quotation marks omitted).

After a § 2255 motion is filed, it is reviewed by the Court and, "[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion." Rule 4(b), Rules Governing Section 2255 Proceedings for the United States District Courts ("§ 2255 Rules"). "If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order." Id. The movant is entitled to reply to the Government's response. Rule 5(d),

§ 2255 Rules. The Court may also direct the parties to provide additional information relating to the motion. Rule 7, § 2255 Rules.

"In reviewing a § 2255 motion in which a factual dispute arises, the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims." Valentine v. United States, 488 F.3d 325, 333 (6th Cir. 2007) (internal quotation marks omitted). "[N]o hearing is required if the petitioner's allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." Id. (internal quotation marks omitted). Movant has the burden of proving that he is entitled to relief by a preponderance of the evidence. Pough v. United States, 442 F.3d 959, 964 (6th Cir. 2006).

A claim that ineffective assistance of counsel has deprived a movant of his Sixth Amendment right to counsel is controlled by the standards stated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To demonstrate deficient performance by counsel, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness." Id. at 688, 104 S. Ct. at 2064. "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance. [Strickland, 466 U.S.] at 689, 104 S. Ct. 2052. The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' Id., at 687, 104 S. Ct. 2052." Harrington v. Richter, ___ U.S. ___, ___, 131 S. Ct. 770, 787, 178 L. Ed. 2d 624 (2011).

To demonstrate prejudice, a prisoner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.[12] "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S. Ct. at 2068. "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' [Strickland, 466 U.S.] at 693, 104 S. Ct. 2052. Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' Id., at 687, 104 S. Ct. 2052." Richter, ___ U.S. at ___, 131 S. Ct. at 787-88; *see also* id. at ___, 131 S. Ct. at 791-72 ("In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . The likelihood of a different result must be substantial, not just conceivable.") (citations omitted); Wong v. Belmontes, 558 U.S. 15, 27, 130 S. Ct. 383, 390-91, 175 L. Ed. 2d 328 (2009) (per curiam) ("But Strickland does not require the State to 'rule out' [a more favorable outcome] to prevail. Rather, Strickland places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different.").

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[12] "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant." Id. at 697, 104 S. Ct. at 2069. If a reviewing court finds a lack of prejudice, it need not determine whether, in fact, counsel's performance was deficient. Id. at 697, 104 S. Ct. at 2069.

The two-part test stated in Strickland applies to challenges to guilty pleas based on the ineffective assistance of counsel. Hill v. Lockhart, 474 U.S. 52, 57-58, 106 S. Ct. 366, 369-70, 88 L. Ed. 2d 203 (1985). "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Id. at 56, 106 S. Ct. at 369 (internal quotation marks omitted). "[T]o satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59, 106 S. Ct. at 370; *see also* Padilla v. Ky., 559 U.S. at 372, 130 S. Ct. at 1485 ("[T]o obtain relief on this type of claim, a [prisoner] must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.").[13]

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[13] The Supreme Court emphasized that,

> [i]n many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than going to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirma-

[Footnote continued on next page]

"Surmounting Strickland's high bar is never an easy task." Padilla, 559 U.S. at 371, 130 S. Ct. at 1385.

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S., at 689-690, 104 S. Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id., at 689, 104 S. Ct. 2052; *see also* Bell v. Cone, 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether

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[Footnote continued from previous page]

> tive defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.

Hill, 474 U.S. at 59, 106 S. Ct. at 370-71.

> it deviated from best practices or most common custom. Strickland, 466 U.S., at 690, 104 S. Ct. 2052.

Richter, ___ U.S. at ___, 131 S. Ct. at 788.

B. De Novo Review of a Magistrate Judge's R&R

The district court has the authority to refer certain pretrial matters to a magistrate judge for resolution. 28 U.S.C. § 636(b)(1)(A). The referral may include dispositive matters such as a motion for summary judgment or a motion for injunctive relief. 28 U.S.C. § 636(b)(1)(B). When a dispositive matter is referred, the magistrate judge's authority only extends to issuing proposed findings of fact and recommendations for disposition, which the district court may adopt or not.

The district court has appellate jurisdiction over any decision the magistrate judge issues pursuant to such a referral. 28 U.S.C. § 636(b); Fed. R. Civ. P. 72. The standard of review applied by the district court depends on the nature of the matter the magistrate judge considers. If the magistrate judge's order addresses a dispositive motion or prisoner petition, the district court should engage in *de novo* review of all portions of the order to which specific written objections have been made. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(b)(3); United States Fid. & Guar. Co. v. Thomas Solvent Co., 955 F.2d 1085, 1088 (6th Cir. 1992).

A *de novo* review requires the reviewing court to reconsider the matter in its entirety, without granting any weight or consideration to the lower court's decision. "The district judge may accept, reject, or modify the recommended disposition; receive further

evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

III. *DE NOVO* REVIEW OF THE R&R

A. The Proposed Findings of Fact

In its Objections to the R&R, the Government states as follows:

> The United States agrees with the Magistrate's position that the "testimonies of Lee and Fitzgerald were consistent that deportation was the determinative issue in Lee's decision whether to accept the plea deal." Lee's attorney believed that because he had lived in the country for a long time, Lee would not be deported. This is the same factual and legal error made by Padilla's attorney. The only factual disagreement with the Magistrate's Proposed Findings of Fact and Padilla's facts is that Lee's attorney also advised him that deportation was a possibility, but that the United States Attorney's Office was not seeking deportation. Nevertheless, this advice was also incorrect concerning deportation because Lee's deportation was not a possibility but automatic.

(ECF No. 63 at 15 (citations omitted).)

The R&R discussed Fitzgerald's testimony that he advised Lee that deportation was a possibility but that the United States Attorney's Office was not seeking deportation and concluded that Lee's testimony was more credible than that of Fitzgerald. (*See* ECF No. 59 at 11.) The R&R also credited the testimony of Lee that, at the guilty plea hearing, Fitzgerald assured Lee that Judge Donald's warning about the possible deportation consequence of a

guilty plea could be disregarded because it was merely a "standard warning for non-U.S. citizen[s]." (Id. at 8; *see also* id. at 11-13 (crediting Lee's testimony over that of Fitzgerald).) The Government has not objected to the factual finding of the R&R about Fitzgerald's statement to Lee during the plea colloquy. Even if Fitzgerald did, at some point during his discussions with Lee, say that deportation was a possibility, those statements were overshadowed by the assurances Fitzgerald provided Lee that he would likely not be deported as a consequence of his guilty plea.

The Court OVERRULES the Government's objection to the Factual Findings in the R&R and ADOPTS those Factual Findings.

B. The Proposed Conclusions of Law

The Government has urged the Court to reject the conclusions of law in the R&R in their entirety. (ECF No. 63 at 3-4.) The Government's objections to the R&R's analysis of the deficient performance prong of Strickland v. Washington and Hill v. Lockhart is largely repetitive of the arguments presented to the Magistrate Judge in the post-hearing briefs. (*See* ECF No. 63 at 16-20; *see also* ECF No. 58 at 7-9 (second post-hearing brief).) The Court concludes that the R&R accurately summarizes the Supreme Court's decisions in Padilla and Chaidez (ECF No. 59 at 17-21), accurately states that those decisions do not affect ineffective assistance claims based on affirmative misrepresentations (id. at 21-26), and accurately concludes that Fitzgerald's advice to Lee amounted to an affirmative misrepresentation (id. at 27-29). The Court OVERRULES the Government's objections to this aspect of the Conclusions of

Law in the R&R and ADOPTS those Conclusions of Law.

The R&R also concluded that Lee had satisfied the prejudice prong of Strickland and Hill. (Id. at 29-31.) As previously stated, *see supra* p. 12, in the guilty plea context, the prejudice prong requires the movant to show that "counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and insisted on going to trial." Hill, 474 U.S. at 59, 106 S. Ct. at 370.

The Supreme Court has emphasized that, "to obtain relief on this type of claim, a [prisoner] must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla, 559 U.S. at 372, 130 S. Ct. at 1485. A prisoner "cannot make that showing merely by telling [the court] now that [he] would have gone to trial then if [he] had gotten different advice. The test is objective, not subjective . . . ." Pilla v. United States, 668 F.3d 368, 373 (6th Cir. 2012). The Supreme Court also emphasized that "it is often quite difficult for petitioners who have acknowledged their guilt to satisfy Strickland's prejudice prong." Padilla, 559 U.S. at 371 n.12, 130 S. Ct. at 1485 n.12.

There is relatively little caselaw applying these standards to claims that a movant was misadvised of the deportation consequences of a guilty plea. In Pilla, the petitioner, a native of India who was an assistant professor at Case Western University, falsely reported that she had received hate mail. After an extensive investigation by the University and the

FBI, it was determined that the petitioner had sent the mail to herself. She pled guilty to making false, misleading, or fraudulent statements to the FBI, in violation of 18 U.S.C. § 1001, and was sentenced to six months in prison and ordered to pay $66,000 in restitution. Id. at 370. Petitioner's attorney encouraged her to plead guilty after learning that the evidence of her guilt was "overwhelming" and the likelihood of success on a motion to suppress was "close to zero." Id. at 370-71. Subsequently, "[a]n immigration judge determined that Pilla's offense was, in fact, an aggravated felony and that she was therefore removable under 8 U.S.C. § 1227(a)(2)(A)(iii). The Board of Immigration Appeals agreed and dismissed Pilla's appeal." Id. at 371. The Court of Appeals denied Pilla's petition for review. Pilla v. Holder, 458 F. App'x 518 (6th Cir. 2012).

Pilla challenged her guilty plea through a petition for a writ of error *coram nobis*, and the Sixth Circuit denied relief, holding that she had not established prejudice within the meaning of Strickland and Hill. Pilla v. United States, 668 F.3d at 373.[14] The Court of Appeals explained:

> As noted above, Pilla faced overwhelming evidence of her guilt, which included a video that showed her planting the letters, a CD of incriminating phone conversations, and FBI interview notes documenting her confession. Given this evidence, the district court found that Pilla "had no realistic chance of being acquitted at trial" and that, if she had pro-

[14] A writ of *coram nobis* is "an extraordinary writ sometimes available to federal convicts who have already completed their prison term." Id. at 370.

> ceeded to trial, she "had no rational defense, would have been convicted and would have faced a longer term of incarceration." Those findings were not clearly erroneous, or indeed erroneous at all. And had Pilla been convicted after trial, she would have been just as removable as she was after her guilty plea. The only consequence of Bell's inaccurate advice—assuming one believes Pilla's assertion that she would have gone to trial had she gotten accurate advice—is that she got a shorter prison term than otherwise. But more to the point, no rational defendant in Pilla's position would have proceeded to trial in this situation. Pilla therefore has not shown that Bell's advice created even a "reasonable probability" of prejudice. And thus she cannot show that Bell's advice "probably ... altered the outcome of the challenged proceeding," as required for a writ of *coram nobis*. . . .

Id.

In Haddad v. United States, 486 F. App'x 517, 518 (6th Cir. 2012), an unpublished decision addressing a petition for writ of error *coram nobis*, the petitioner, a native of Syria, pled guilty to possessing LSD in 1997, making him deportable. Relying on Pilla, the panel found that the petitioner could not establish prejudice. The panel reasoned as follows:

> Haddad therefore cannot establish prejudice merely by stating now that he would have gone to trial then if he had been told that his plea would authorize the government to deport him. Pilla, 668 F.3d at 373. "The test is objective, not subjective": to pre-

vail, "'a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'" Id. (quoting Padilla, 130 S.Ct. at 1485). This in turn requires a "prediction of the likely outcome at trial." Dando v. Yukins, 461 F.3d 791, 798 (6th Cir. 2006); *see* Pilla, 668 F.3d at 373 (analyzing Pilla's chance of success at trial to determine whether she was prejudiced). In many cases, "this inquiry will be dispositive." Maples v. Stegall, 340 F.3d 433, 440 (6th Cir. 2003).

. . . .

The same logic [as was presented in Pilla] applies in the present case. Like Pilla, Haddad states now that he would have gone to trial if his attorney had advised him that pleading guilty would make him deportable. But this statement is not enough to establish prejudice. Id. And the evidence against Haddad is strong. He was caught red-handed: while Haddad was entering Canada from the United States, a customs agent searched Haddad and found three pieces of paper that tested positive for LSD.

Haddad also has no rational defense to the crime of possessing drugs. Before the district court, he asserted that he would have raised the following three possible defenses: the search or seizure was illegal, he did not possess the substances found during the search, and the government could not prove that those substances were actually illegal drugs. But he offers no reason to believe that these defenses had any chance of success, let

alone that they were rational. And there are good reasons for discounting each defense, which we address in turn. The Supreme Court has held that routine border searches of persons entering the country do not require reasonable suspicion, probable cause, or a warrant. United States v. Montoya de Hernandez, 473 U.S. 531, 538, 105 S. Ct. 3304, 87 L. Ed. 2d 381 (1985); *see* United States v. Flores-Montano, 541 U.S. 149, 152–55, 124 S. Ct. 1582, 158 L. Ed. 2d 311 (2004). And although this court has not specifically decided the question whether that doctrine extends to border searches of persons leaving the country, Sixth Circuit precedent suggests that the doctrine does. *See* United States v. Boumelhem, 339 F.3d 414, 420–423 (6th Cir. 2003) (holding that the doctrine extends to searches of articles leaving the country). The language Boumelhem used in a section heading supports this point: "The Border Search Exception Applies to Persons and Articles Leaving the Country, and Not Only to Those Entering the Country." Id. at 420 (emphasis added); *accord* United States v. Humphries, 308 Fed. Appx. 892, 896 (6th Cir. 2009) (citing Boumelhem for the proposition that "[w]e have extended the rational underlying the suspicionless search of persons and effects entering the country to situations where persons or articles attempt to exit the country as well" (emphasis removed)). The last two defenses—that Haddad did not possess the substances found during the search and that the government could not prove that those substances were illegal drugs—are

frivolous because Haddad was caught personally possessing a substance that tested positive for LSD, which is a controlled substance under federal law, *see* 21 U.S.C. §§ 802(6), 812 Schedule I(c)(9). The magistrate's Report and Recommendation, which the district court adopted, implicitly reached the same conclusion about the defenses that Haddad asserts he would have raised—namely, that they are not realistic.

In addition to the strong evidence against him and his lack of viable defenses, another weight tipping the scale in favor of Haddad pleading guilty is the benefit he received by doing so. He received the minimum fine ($1000) and no prison time. Had he gone to trial and been convicted, as seems highly likely, he would be just as deportable as he was after pleading guilty and he would have faced imprisonment for up to one year or a higher fine, or both, 21 U.S.C. § 844(a).

The only counterweight Haddad points to in support of his claim that he would have insisted on going to trial is the after-the-fact allegation in his affidavit; in other words, all Haddad offers to support his claim is the claim itself. Not only is that claim insufficient to show prejudice because the test is objective, *see* Pilla, 668 F.3d at 373, but the entire record goes against it. Like Pilla, Haddad faced strong evidence of his guilt, and if he had gone to trial, he had no rational defense, would have been convicted, would have faced time in prison, and would have been deportable anyway. *See* id. "[N]o

> rational defendant in [Haddad's] position would have proceeded to trial." Id. Haddad therefore cannot show the prejudice necessary for an ineffective-assistance claim. This conclusion is buttressed by the fact that Haddad does not even argue on appeal that he satisfies the prejudice prong.

Id. at 521-22.

Two district courts in this circuit have also evaluated a prisoner's claim that he would not have pled guilty if he had known that he would be deported. United States v. Chan Ho Shin, 891 F. Supp. 2d 849, 858 (N.D. Ohio 2012), involved a native of South Korea who had become a lawful permanent resident alien of the United States, raised his family in this country, and operated a successful business. He pled guilty to four counts of filing false tax returns and was sentenced to probation. Id. at 851. After the commencement of deportation proceedings, the petitioner filed a petition for a writ of error *coram nobis*. Id. The court denied relief because Shin could not establish prejudice. Id. at 857-58. The court explained:

> Even if Shin could show his counsel's performance was deficient and fell below an objective standard of reasonableness, he cannot establish that such deficiency caused him actual prejudice. Shin argues he would not have pled guilty "[h]ad [he] known or been told that [his] guilty plea in this case would lead to [his] automatic removal from the United States". According to Shin, such a blanket assertion is a "sufficient showing" under Hill. Hill, however, says the complete opposite: "[a] petitioner's allegations are insufficient to satisfy the Strickland v.

Washington requirement of 'prejudice.'" 474 U.S. at 60, 106 S. Ct. 366. Indeed, the Sixth Circuit has clarified that a petitioner cannot satisfy the prejudice element by merely telling the court that he would have gone to trial if he had received different advice. *See* Pilla, 668 F.3d at 372-73; *see also* Haddad v. United States, 2012 WL 2478355, *3-4 (6th Cir. 2012). Rather, the test is objective, and Shin must convince this Court "that a decision to reject the plea bargain would have been rational under the circumstances." Pilla, 668 F.3d at 373; *see also* Hill, 474 U.S. at 59, 106 S. Ct. 366. Shin's brief is completely silent in this regard.

Notwithstanding Shin's silence, this Court is convinced that accepting the plea was certainly a rational choice in this case. A conviction following a trial would have resulted, at a minimum, in a sentencing guidelines offense level of 14, which carries a sentencing range of 15 to 21 months imprisonment. Shin's acceptance of responsibility led to a lower guidelines range and, due in large part to his cooperation, Shin was ultimately sentenced to a term of probation. Shin offers no argument that he had a realistic chance of being acquitted at trial, and there is no evidence in the record that Shin had a rational defense to the charges.

Moreover, had Shin been convicted after a trial, he would not have eliminated, or even reduced, his chances of removal. The only consequence of his counsel's "erroneous" advice—assuming Shin's assertion that he

> would have gone to trial had he received more accurate advice—is that he received a more lenient sentence. In short, nothing leads to the conclusion that a rational defendant in Shin's position would have proceeded to trial. Shin fails to show his lawyer's advice created a "reasonable probability" of prejudice, and thus he cannot show that the advice "'probably ... altered the outcome of the challenged proceeding,' as is required for a writ of *coram nobis*." Pilla, 668 F.3d at 373 (quoting Johnson, 237 F.3d at 755).

Id. (record citations omitted).

The court briefly addressed the petitioner's personal circumstances, although not in the context of its analysis of the prejudice prong:

> On one hand, Shin's situation is lamentable. After coming to this country, Shin and his wife were able to build a successful business and raise a family here in Toledo. Shin became a lawful permanent resident and was close to attaining American citizenship. In a letter dated June 2009, his counsel confirmed that but-for his troubles with the IRS, Shin would be a U.S. citizen today. Shin was living the proverbial "American dream," but now he faces deportation.
>
> On the other hand, Shin committed a serious crime—he diverted hundreds of thousands of dollars from his business for personal use, defrauding the Government over a period of years. Had becoming an American citizen been as important to him as he contends, Shin should have avoided cheating

> and lying to the IRS. Immigration law classifies some crimes as removable offenses, and Shin's was one of them. Nothing in the record demonstrates Shin received ineffective assistance of trial counsel and, for all the reasons stated above, Shin's Petition must be denied.

Id. (record citation omitted).

Finally, United States v. Abou-Khodr, No. 99-CV-81073, 2013 WL 4670856 (E.D. Mich. Aug. 30, 2013), was a successful petition for a writ of error *coram nobis* filed by a native of Lebanon. The petitioner was "legally admitted to the United States on September 29, 1996. He is married with six children, all of whom are citizens of the United States, and he is the part-owner of a family business in this country." Id. at *1. About-Khodr pled guilty to conspiring to possess heroin with the intent to deliver based on the representations of his attorney, made after negotiations with the Government, that if he pled guilty and cooperated he would be allowed to stay in the country. Id. The Government had made a § 5K1.1 motion, which was granted, and Abou-Khodr was sentenced to a term of imprisonment of six months followed by two years of supervised release. Id. at *2. Abou-Khodr submitted an affidavit in support of his petition that stated, in pertinent part, that "because he ... was of the firm and committed belief if he ... was deported, it would be catastrophic for himself and his family, as well as the family business, he ... would rather face the prospect of a long prison term rather than be deported from this country." Id. at *6.

In finding prejudice, the Abou-Khodr court reasoned as follows:

The government relies on Haddad v. United States, 486 Fed. Appx. 517 (6th Cir. 2012), in support of its position that Abou-Khodr's petition for a writ of *coram nobis* lacks merit. Haddad is easily distinguishable. In that case, defendant filed a petition for a writ of *coram nobis* to vacate his sentence for possession of LSD on the basis that his attorney provided ineffective assistance because he failed to advice [sic] him that pleading guilty would make him deportable. Id. at 518. Unlike this case, the petitioner did not allege that his attorney affirmatively promised him that pleading guilty would allow him to stay in the country, merely that he had failed to inform him that it was a possible consequence. Also, the Sixth Circuit found that the evidence against Haddad was overwhelming where he was stopped at the border and caught red-handed with drugs on his person, and he had no viable defense. Id. at 521. Under these circumstances, the Sixth Circuit ruled that a rational person would have pleaded guilty to the offense and thus, denied the petition for the writ of *coram nobis*. Id. at 522.

In this case, by contrast, it would have been objectively reasonable for Abou-Khodr to insist on going to trial. The evidence against him was weak and circumstantial, relying primarily on his fraternal connection to his brother who was also named as a defendant. According to the government's express agreement at the August 22, 2013 status conference, Abou-Khodr's alleged involvement in the conspiracy was minor and

the quantity of drugs involved was minimal. It is the court's recollection that Abou-Khodr's alleged involvement in the conspiracy was not based in any significant respect on any criminal conduct on his part, but on his familial relationships and actions taken at the direction of his brother and others who were the culpable ones. The only conduct attributable to Abou-Khodr in the presentence investigation report is that Abou-Khodr and his brother Kalil were alleged partners of drug supplier Housam Hamdar.

Moreover, the presentence investigation report does not set forth any evidence against Abou-Khodr or describe with any particularity his alleged participation in the conspiracy. Of the thirty-eight paragraphs outlining the offense conduct of the conspiracy in that report, only three paragraphs mention Abou–Khodr at all. Paragraph 14 states, "Khodr's brother, ALI ABOU–KHODR, was also a partner of Hamdar." This is the sum total of the offense conduct attributable to Abou-Khodr in the presentence investigation report. Paragraph 30 mentions Abou-Khodr by name only, but it does not describe his alleged involvement in the conspiracy; it merely states that a search warrant was executed based on three of his brother's alleged fraudulent use of credit cards. Finally, paragraph 38 mentions that Abou-Khodr has entered into a plea agreement with the government. Based on the presentence investigation report, it appears that the government's case against Abou-

Khodr was not strong. At issue at trial would be whether he acted with guilty knowledge or simply because of his brother's request.

Abou-Khodr's ability to cooperate with the government against others of the 34 defendants named in the conspiracy, did not arise from his own criminal wrongdoing, but from his interconnections with his relatives, which in a Lebanese family are extremely close-knit. Abou-Khodr has submitted the affidavit of his defense attorney stating:

> 3. That on the basis of the aforementioned review of the government's proofs, it was and is my concrete and professional opinion that the evidence against Mr. Abou-Khodr was weak, circumstantial and "at best" ambiguous concerning the culpability of [my] client.
>
> 4. That it was and continues to be my professional conclusion my client was essentially "merely present" at various times, dates and places and appeared not to fully appreciate or be cognizant of what may have been transpiring around him.

Abou-Khodr would not have pleaded guilty but for his attorney's false guarantees that he would not be deported, and given the weak and circumstantial evidence against him, there was a likelihood of a favorable outcome should he have proceeded to trial. Accordingly, Abou-Khodr has satisfied both prongs of the Strickland test and has shown

> ineffective assistance of counsel in violation of his Sixth Amendment rights.

Id. at *7-8 (record citation omitted).

In each of the aforementioned cases, the petitioners appeared to have extensive ties to the United States. The decisions in Shin and Abou-Khodr emphasized the strength of those ties, which included lengthy residence in the United States, wives and children, and business interests. Notably, however, none of those decisions addressed the petitioner's ties to the United States in their analysis of prejudice. Instead, the only relevant factors addressed in the prejudice analysis in Pilla, Haddad and Shin were the strength of the Government's case and the benefit, in the form of a reduced sentence, the petitioner received by pleading guilty. Likewise, in granting relief in Abou-Khodr, the court emphasized the weakness of the Government's case and that petitioner was induced to plead guilty by his attorney's affirmative representation that the plea agreement would allow him to remain in the country.[15]

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[15] Abou-Khodr also appears to have involved affirmative misrepresentations by the Government. As the court explained:

> At the plea hearing, AUSA Joe Allen stated that depending on Abou–Khodr's cooperation, the government would recommend an asylum type program, if appropriate, designed to keep Abou–Khodr in the country, even though he might otherwise be subject to removal. While this court is convinced that the government's promises to assist Abou–Khodr to remain in the United States were made in good faith and without any intention to mislead, there were many alternative ways discussed between counsel in chambers conferences that the government would utilize if possi-

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This case is similar to in Pilla, Haddad and Shin in that the Government's case against Lee was strong. Lee, through counsel, has accepted the Government's version of events at the guilty plea hearing and also has not objected to the factual summary in the PSR. At the evidentiary hearing, Lee's attorney testified that there did not appear to be a valid motion to suppress (Evidentiary Hr'g Tr. ("§ 2255 Hr'g Tr.") 87, Lee v. United States, No. 10-2698-JTF-dkv (W.D. Tenn.), ECF No. 56) and that the only colorable defense at trial would have been to argue that the pills that were found were intended for personal use (id. at 89-90). Based on the number of pills that were seized and the sales to the confidential informant, Fitzgerald believed that it would have been "difficult, let's put it that way, not impossible but it would [have been] difficult" to succeed at trial. (Id. at 90.) Fitzgerald testified that "I thought it was a bad case to try." (Id. at 91.) Lee's claim that he provided the pills to friends at cost also is not a viable defense to a drug trafficking charge. *See, e.g.*, United States v. Moore, 423 F. App'x 495, 500 n.2 (6th Cir. 2008) ("A defendant need not intend to *sell*

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> ble, to keep Abou–Khodr in this country. Among those alternatives were support for an asylum petition, issuance of a material witness warrant, and support for an "S" visa. Such assurances undoubtedly contributed to induce detrimental reliance by Abou–Khodr in proceeding with his plea. As explained by AUSA Lemisch at the August 22, 2013 status conference, there was never a real possibility that an "S" visa for Abou–Khodr could have been obtained.

Abou-Khodr, 2013 WL 4670856, at *1.

narcotics in order to be guilty of possession with intent to distribute.").

Lee also received tangible benefits from the plea deal. Judge Donald sentenced Lee to a term of imprisonment of one year and one day, a significant downward variance from the guideline sentencing range of twenty-four (24) to thirty-six (36) months.[16] Had Lee been sentenced after a trial, he would have lost the three-point reduction for acceptance of responsibility, leaving him with an offense level of 20. *See supra* p. 5 n.6. Given his criminal history category of I, the guideline sentencing range would have been thirty-three (33) to forty-one (41) months. Thus, the guilty plea itself appears to have greatly reduced Lee's sentence.

Although the R&R purports to apply an objective standard, its analysis of prejudice, which focuses on Lee's ties to the United States and his desire to avoid deportation, is entirely subjective. (*See* ECF No. 59 at 29-31.) The proper focus under an objective standard is on whether a reasonable defendant in Lee's situation would have accepted the plea offer and changed his plea to guilty. In light of the overwhelming evidence of Lee's guilt, a decision to take the case to trial would have almost certainly resulted in a guilty verdict, a significantly longer prison sentence, and subsequent deportation.

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[16] Judge Donald explained that she varied from the guideline range because, under the circumstance of the case, including the absence of any prior criminal history, Lee's history of gainful employment, and his drug addiction, a guideline sentence was not necessary "to get this defendant's attention and to punish." (Sentencing Hr'g Tr. 16-17.)

Lee's situation is factually similar to that of the petitioner in Shin, who had a wife and children who were United States citizens and who had established a successful business in this country. Despite those factors, the court concluded that he was unable to establish prejudice because he had no rational defense to the charges and no realistic prospect of avoiding a guilty verdict and subsequent deportation. Like Shin, Lee has no rational defense to the charge and no realistic prospect of avoiding conviction and deportation. Also like Shin, Lee may strongly prefer to remain in the United States, but a rational person in his circumstances would have accepted the plea agreement.[17]

The Court REJECTS this portion of the R&R and HOLDS that Lee has not established prejudice. Therefore, Lee is not entitled to relief on his claim that his attorney rendered ineffective assistance by affirmatively misadvising him of the deportation consequences of a guilty plea.

The two additional claims in Lee's § 2255 Motion were not addressed at the evidentiary hearing, and the R&R concluded that they have been abandoned. (*See* ECF No. 59 at 2 n.2; *see also supra* pp. 5-6 (listing the claims).) Movant has raised no objection

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[17] Although the R&R mentions the Government's concession, in its first post-hearing brief, that Lee had satisfied both elements of a Strickland claim (ECF No. 59 at 29; *see also* ECF No. 40 at 2 ("In light of the testimony during the hearing, the United States concedes the petitioner's attorney was deficient in performance and that deficiency prejudiced the petitioner.")), the weight given that factor in the R&R is unclear. The Court gives this factor no weight in light of the evolving positions of both parties in this litigation and the absence of any detrimental reliance by Movant.

to that finding and, therefore, the Court ADOPTS this portion of the R&R and DISMISSES Movant's remaining claims.[18]

The § 2255 Motion is DENIED. Judgment shall be entered for the United States.

IV. APPEAL ISSUES

Twenty-eight U.S.C. § 2253(a) requires the district court to evaluate the appealability of its decision denying a § 2255 motion and to issue a certificate of appealability ("COA") "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also* Fed. R. App. P. 22(b). No § 2255 movant may appeal without this certificate.

The COA must indicate the specific issue(s) that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2) & (3). A "substantial showing" is made when the movant demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate

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[18] In his Second Post-Hearing Brief, Movant purported to raise two additional ineffective assistance claims, namely, that his attorney failed to seek a non-deportable disposition and that he was unaware of the reasonably foreseeable extension of law once the Supreme Court granted certiorari in Padilla. (ECF No. 54 at 2; *see supra* pp. 8-9.) Movant has presented no evidence, and made no argument, that a non-deportable disposition was reasonably likely under the facts of the case. (*See* ECF No. 54 at 8-9.) Even if it were assumed that Padilla was a reasonably foreseeable extension of the law, Movant cannot show prejudice for the reasons previously stated. Therefore, the two issues presented in Movant's Second Post-Hearing Brief to the Magistrate Judge are without merit.

to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039, 154 L. Ed. 2d 931 (2003) (internal quotation marks and citation omitted); *see also* Henley v. Bell, 308 F. App'x 989, 990 (6th Cir. 2009) (per curiam) (same). A COA does not require a showing that the appeal will succeed. Miller-El, 537 U.S. at 337, 123 S. Ct. at 1039; Caldwell v. Lewis, 414 F. App'x 809, 814-15 (6th Cir. 2011). Courts should not issue a COA as a matter of course. Bradley v. Birkett, 156 F. App'x 771, 773 (6th Cir. 2005).

In this case, reasonable jurists could disagree about the resolution of Claim 1 of Movant's § 2255 Motion, that trial counsel affirmatively misadvised him about the deportation consequences of a guilty plea. The Court GRANTS a certificate of appealability on that claim.

Rule 24(a)(1) of the Federal Rules of Appellate Procedure provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. However, if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal *in forma pauperis*, the prisoner must file his motion to proceed *in forma pauperis* in the appellate court. *See* Fed. R. App. P. 24(a) (4)-(5). The Court CERTIFIES, pursuant to Rule 24(a), that an appeal in this matter on Claim 1 would be taken in good faith.[19]

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[19] Any motion for leave to proceed *in forma pauperis* on appeal must comply with Rule 24(a)(5) and must be filed within 30 days of the date of entry of this order.

IT IS SO ORDERED this 20th day of March, 2014.

BY THE COURT:

s/John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff/Respondent.	)	Civ. No. 10-02698-JTF-dkv
vs.	)	Crim. No. 09-20011
JAE LEE, Defendant/Petitioner.	)	

REPORT AND RECOMMENDATION

On September 28, 2009, the petitioner, Jae Lee ("Lee), was sentenced to a term of imprisonment of twelve months and one day plus three years supervised release for one count of unlawful possession with intent to distribute MDMA (ecstasy) in violation of 21 U.S.C. § 841(a)(1), which is an aggravated felony. Lee pled guilty to the charge on June 17, 2009. Now before this court is Lee's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255,[1] filed *pro se* on September 24, 2010, in

[1] Section 2255, entitled "Federal custody; remedies on motion attacking sentence," states in part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentences to vacate, set aside or correct the sentence.

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which Lee alleges that his guilty plea, sentence, and conviction were rendered in violation of his Sixth Amendment guarantee to effective assistance of counsel. (Motion, D.E. 1.) The motion was referred to the United States Magistrate Judge for an evidentiary hearing and a report and recommendation. (Order of Reference, D.E. 28.)

In his motion, Lee argues that the performance of attorney Larry E. Fitzgerald ("Fitzgerald"), who represented Lee throughout the criminal proceedings, was constitutionally deficient in three regards: (1) Fitzgerald failed to advise Lee that a collateral consequence of pleading guilty would be that Lee would be deported, and in fact affirmatively misadvised Lee that he would *not* be deported if he pled guilty; (2) he failed to adequately investigate Lee's "case, possible defenses, witnesses, or discovery" in order to properly assess the advisability of proceeding to trial; and (3) he misrepresented to the court at Lee's sentencing that Lee was a United States citizen, when in fact Lee was a lawful permanent resident of the United States and has not yet obtained citizenship in this country.[2]

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28 U.S.C. § 2255(a).

[2] Only the first of these three claims was discussed at the evidentiary hearing or in post-hearing briefs. Indeed, Lee's first post-hearing brief states, "While Mr. Lee has raised numerous grounds of ineffective assistance of counsel . . . in his original § 2255 Motion . . . and Amended Motion . . . , the crux of the argument is that trial counsel's performance fell below the standard articulated in *Padilla v.* Kentucky . . . ." (Lee's First Post-Hearing Brief, D.E. 37 at 6.) For these reasons, the court presumes that Lee has abandoned the latter two of these claims, and this report and recommendation will address only the first

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At the evidentiary hearing, held February 9, 2012, the government called Fitzgerald as a witness. Lee took the stand and testified on his own behalf but called no other witnesses.[3] Lee was represented at the hearing by counsel. Based on the evidence presented at the hearing, arguments of counsel, and briefs of the parties, including two sets of post-hearing briefs, the court proposes the following findings of fact and conclusions of law and recommends that Lee's motion be granted.

I. PROPOSED FINDINGS OF FACT

In early January 2009, law enforcement officers obtained a federal search warrant for Lee's residence based on information provided to them by and collected from a confidential informant. The search was executed on January 6, 2009, and officers recovered approximately eighty-eight ecstasy pills from inside the residence. On January 28, 2009, Lee was charged in an indictment with possessing with the intent to distribute the substance MDMA (ecstasy) in violation of 21 U.S.C. § 841(a)(1). Soon after being served with the indictment, Lee retained Fitzgerald to represent him, and on January 30, 2009, Fitzgerald appeared

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claim. Regardless, Lee's claim concerning Fitzgerald's incorrect statement at sentencing regarding Lee's citizenship was harmless because Lee correctly informed the sentencing judge he was *not* a citizen of the United States, and no prejudice to Lee resulted from Fitzgerald's statement.

[3] At the time of the hearing, Lee was in the custody of ICE at a federal detention center in Louisiana. He was transported to Memphis, Tennessee, to attend the hearing pursuant to a writ of habeas corpus ad testificandum, issued by the court, commanding his appearance. (Writ, D.E. 30.)

on Lee's behalf at the initial appearance. Lee initially pled not guilty to the charge in the indictment.

At the evidentiary hearing, Fitzgerald testified that he has been practicing predominately criminal law for twenty-seven years and has represented clients in at least one-hundred trials. He testified that in his assessment, Lee's was "a bad case to try" because, among other reasons, there was no basis for attacking the search of Lee's residence, and the number of pills recovered together with Lee's alleged sale of the drug to a confidential informant severely undermined any possible defense that the drugs were for personal use and not for distribution.

Lee is a lawful permanent resident of the United States who came here as a child from Korea in 1982. He was educated in the United States and since arriving here has never returned to Korea. For over twenty years, he has lived in Memphis, Tennessee, where he owns and operates two restaurants. His mother and father, who have obtained American citizenship, reside in Brooklyn, New York. They are elderly, and Lee is, according to his testimony, "the only child left to take care of them." (Hearing Transcript, D.E. 56 at 28.)

In discussing his options in the case with Fitzgerald, Lee repeatedly raised the question of deportation and indicated that it was his main concern in deciding how to proceed. Fitzgerald testified that he does not and has never practiced immigration law and was not aware of the fact that a guilty plea to a violation of 21 U.S.C. § 841(a)(1), the charge named in the indictment against Lee, would result in mandatory, automatic deportation. Fitzgerald did not consult with an immigration lawyer about Lee's

case nor did he refer Lee to an immigration lawyer for assistance.

Fitzgerald and Lee participated with the government in a proffer session in February 2009. There was apparently a plea agreement in consideration in which, in exchange for a plea of guilty, the government would agree to deduct three points for acceptance of responsibility, reducing Lee's offense level to 17, and would be complicit with the applicability of the statutory safety valve to Lee's sentence. Following the proffer session, Fitzgerald discussed with Lee the risk of going to trial versus the benefits of pleading guilty. Fitzgerald advised Lee that he would likely face between three and five years of imprisonment if he went to trial and were convicted whereas if he accepted the plea agreement he would be looking at a much shorter term of imprisonment or possibly even just probation. As to deportation, Fitzgerald represented to Lee that "the government" was not seeking to deport Lee as part of the proposed plea agreement. At the evidentiary hearing, Fitzgerald testified that by "the government" he meant the United States Attorney's Office. Lee, however, interpreted "the government" to mean the United States government in whole. Lee did not understand that the United States Attorney's Office operates separately and apart from the Department of Homeland Security nor that the latter (through its agencies) alone is authorized to and tasked with instituting removal (deportation) proceedings.[4] Fitzgerald testi-

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[4] References to the entity "INS" are scattered throughout the parties' briefs as well as the arguments and testimony presented at the hearing. INS, or the United States Immigration and Naturalization Service, is a now-defunct federal agency

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fied that he also told Lee that he "did not know what immigration would do." Lee, however, testified that Fitzgerald specifically advised him, "[Y]ou have been in the United States so long they cannot deport you. Even if they want to deport you, it's not in the plea agreement, the government cannot deport you." (Hearing Transcript, D.E. 56 at 26.) The testimonies of Lee and Fitzgerald were consistent that deportation was the determinative issue in Lee's decision whether to accept the plea deal.

Ultimately, Lee accepted the plea deal and changed his plea to guilty on June 17, 2009. Fitzgerald testified that Lee believed he would not be deported if he pled guilty and that this belief was "the key to [Lee's] decision" to plead guilty. Fitzgerald further testified that had Lee known he would be deported for pleading guilty, it is probable Lee would have chosen to proceed to trial and indeed Fitzgerald would have advised him to do so. Lee, too, testified that he absolutely would have accepted the risk of litigation had he known that deportation was a consequence of his guilty plea.

At Lee's change-of-plea hearing, the district judge, prior to accepting Lee's guilty plea, inquired whether Lee was a United States citizen. Lee replied

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within the Department of Justice that was, up until 2003, charged with administering and enforcing immigration and naturalization laws in the United States. As of March 1, 2003, INS ceases to exist, and the majority of all former INS functions now belong to three sub-entities, one of which is ICE, within the newly created Department of Homeland Security ("DHS"). As such, this court will presume that all references to INS are intended as references to a relevant DHS agency.

that he was not a citizen. The judge then informed Lee that deportation and ineligibility for American citizenship were two possible consequences of his guilty plea and asked him if that reality in any way affected his decision to plead guilty. Lee responded in the affirmative. The judge then asked Lee to explain *how* the potentiality of the two immigration-related consequences affected his decision. Lee responded, "I don't understand." The judge then asked, "Well, knowing those things do you still want to go forward and plead guilty?" Lee responded again in the affirmative.

At the evidentiary hearing in the instant case, Lee testified that he initially expressed confusion at his change-of-plea hearing after the judge mentioned the possibility of deportation because Fitzgerald had previously advised him he would not be deported. According to Lee, though, after he told the judge "I don't understand," Lee looked up at Fitzgerald for guidance, and Fitzgerald, in a whisper, assured Lee that he could disregard the judge's deportation warning as it was merely a "standard warning for non-U.S. citizen[s]." Fitzgerald confirmed that he and Lee conferred for a few seconds at that moment in the change-of-plea hearing, but he denies instructing Lee to disregard the judge's immigration-related warnings. Fitzgerald testified, "I think I might have told him [at that point] . . . the same thing I'[d] been telling him the whole time," that "the government" was not seeking deportation but that "I [could not] tell him what's going to happen later." (*See* Hearing Transcript, D.E. 56 at 99.)

The court accepted Lee's guilty plea. On September 28, 2009, the court sentenced Lee to a period of incarceration of twelve months and one day. A judg-

ment to that effect was entered on September 29, 2009. Pursuant to order of the court, Lee self-surrendered to the United States Marshal on February 1, 2010, whereupon he was informed that the Bureau of Prisons had designated the Adams County Correctional Center ("ACCC") in Mississippi as the place for Lee to serve his sentence.

Upon arriving at ACCC, Lee learned that this particular correctional facility was a "special institution" that "*exclusively* housed federal inmates" who were facing deportation upon completion of their sentences. (*See* Motion, D.E. 1 at 31 (emphasis in original).) Soon thereafter, Lee's case manager at ACCC informed him that his 21 U.S.C. § 841(a)(1) conviction had rendered him deportable and that the institution of removal proceedings against him was imminent. Lee contacted Fitzgerald about his predicament and requested from Fitzgerald a letter "confirming the Government had agreed not to deport him, as well as that such was the advice Fitzgerald had given him." (*See id.*) Fitzgerald assented and wrote the following in a letter that he signed and addressed to "Whom It May Concern":

> There was never any discussion of deportation during the negotiation of the Plea Agreement or during Sentencing. It was my understanding that the Government was not seeking Deportation of Mr. Jae Lee.
>
> Please feel free to contact me at my office if needed for further discussion concerning this matter.

(Hearing Ex. 1.) On September 24, 2010, Lee filed *pro se* the instant motion for habeas relief under 28

U.S.C. § 2255 arguing ineffective assistance of counsel.[5]

After completion of his criminal sentence, specifically on December 8, 2010, Lee was transferred into the custody of the United States Immigration and Customs Enforcement (ICE). It is unclear when removal proceedings were instituted against Lee. He only testified that he was ordered removed from the country in August 2011 and is currently (or was at the time of the hearing) being detained at the Oakdale Federal Detention Center in Oakdale, Louisiana, pending resolution of his habeas petition.

The testimonies of the witnesses at the evidentiary hearing were largely credible and consistent with one another. The only discrepancies between the respective accounts of Lee and Fitzgerald were with respect to (1) whether Fitzgerald qualified his repeated statements to Lee that "the government" was not seeking deportation with the caveat that deportation was nonetheless a potential consequence of the guilty plea as he (Fitzgerald) did not know "what immigration would do;" and (2) whether Fitzgerald instructed Lee to disregard as merely a "standard warning" the statement of the judge at Lee's change-of-plea hearing that his plea might result in deportation. As to both of these factual disputes, the court finds the testimony of Lee to be more credible than that of Fitzgerald.

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[5] On July 19, 2011, attorney Patrick McNally entered an appearance on behalf of Lee in this habeas action. (*See* Notice of Appearance, D.E. 18.) Thus and thereafter, Lee no longer proceeds *pro se*.

With regard to the first dispute, the content of the letter that Fitzgerald wrote and signed on Lee's behalf (*see* Hearing Ex. 1) contradicts Fitzgerald's testimony at the hearing. In the letter, Fitzgerald declared that it was *his own* understanding that "the Government was not seeking Deportation of [Lee]." This suggests that, in advising Lee on the guilty plea, Fitzgerald either (1) was not himself aware that the decision whether to institute removal proceedings against an alien was not one made by the United States Attorney's Office or (2) appreciated the distinction between the governmental entities and their respective functions but nonetheless believed that the absence of any mention of deportation (removal) in the criminal plea agreement necessarily suggested that deportation would not result from the guilty plea. Either scenario indicates that Fitzgerald was not aware, much less did he impart to Lee, the potentiality that some federal governmental entity distinct from the United States Attorney's Office might later decide to deport Lee as a result of his guilty-plea conviction. The court therefore credits Lee's account of his and Fitzgerald's conversations regarding the risk of deportation and finds as fact that there was no discussion of any uncertainty as to "what immigration might do."

As to the second dispute, Lee recounted verbatim the short colloquy at the change-of-plea hearing between him and Fitzgerald concerning the judge's deportation warning. In contrast, Fitzgerald, while acknowledging the conversation occurred, was only able to testify as to what he "thinks" he "might have said" to Lee during it. Furthermore, the fact that Lee went from being confused at the change-of-plea hearing before conferring with Fitzgerald to then afterward expressing certainty that despite the

judge's warnings about any immigration-related consequences he nonetheless wished to proceed with changing his plea, indicates that whatever Fitzgerald said to Lee in the interim must have provided adequate assurance to Lee that in spite of what the judge had said, he would not be deported if he pled guilty. This is especially likely to be true considering the undisputed fact that had Lee at all been aware that deportation was possible as a result of his guilty plea, he would have not have pled guilty. By Lee's account of his and Fitzgerald's short colloquy, Fitzgerald indeed provided the assurance Lee needed to proceed with his change of plea. However, by Fitzgerald's account, there would have been no such assurance because the statements he claims he made to Lee at that time left open the possibility that deportation might result at some point in the future. If in fact Fitzgerald had made such statements, the court finds it unlikely Lee would have immediately thereafter expressed an intent to proceed with entering a plea of guilty. For all these reasons, the court credits the testimony of Lee on this matter.

There was discussion at the evidentiary hearing as to the effect, if any, on Lee's case of the United States Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010), a section 2254 case in which the petitioner sought to set aside his guilty plea because his attorney had not informed him of the collateral consequence of deportation. The Supreme Court granted certiorari in that case on February 23, 2009, to determine "whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country," *Padilla*, 130 S. Ct. at 1478. *See Padilla v. Kentucky*, 555 U.S. 1169, 129 S. Ct. 1317

(2009)(granting certiorari as to 253 S.W. 3d 482 (Ky. 2008)). Approximately four months after the Supreme Court granted certiorari but before it issued a decision in *Padilla*, Lee entered his guilty plea. A judgment of conviction was entered on September 29, 2009, and Lee had fourteen days to file a notice of appeal. Lee did not file an appeal within fourteen days, and thus his conviction became final on October 13, 2009. A little over five months later, on March 31, 2010, the Supreme Court decided *Padilla*, holding that the Sixth Amendment's right to effective assistance of counsel requires an attorney for a criminal defendant to advise his client of any deportation risk that arises from a guilty plea. *Padilla*, 130 S. Ct. at 1486. In the instant motion of Lee, filed almost six months after the decision in *Padilla*, Lee relies heavily on *Padilla* in arguing that his guilty plea should be set aside and his conviction vacated based on the ineffective assistance of his counsel Fitzgerald. The government, in its response, argued that *Padilla*'s holding should not be applied retroactively to Lee's case.

As of the time of the February 9, 2012 evidentiary hearing in this case, there was a split among the circuits as to whether *Padilla* applied retroactively, and the Sixth Circuit had not weighed in on the issue. At the conclusion of the evidentiary hearing, the court ordered the parties to submit post-hearing briefs specifically addressing, *inter alia*, the applicability (or not) of *Padilla*. Lee filed his post-hearing brief on March 9, 2012, (Lee's First Post-Hearing Brief, D.E. 37), and the government filed its response brief on April 16, 2012, (Gov.'s Resp. to

Lee's First Post-Hearing Brief, D.E. 40).[6] Then, on April 30, 2012, the United States Supreme Court granted certiorari in the case of *Chaidez v. United States* to decide the issue of "whether *Padilla* applies to persons whose convictions became final before its announcement." *Chaidez v. United States*, 132 S. Ct. 2101 3335 (2012)(granting certiorari as to 655 F.3d 684 (7th Cir. 2011)). In light of this development, the court entered an order staying the case until the Supreme Court decided *Chaidez*. (Order Staying Case, D.E. 46.)

On February 20, 2013, the Supreme Court announced its decision in *Chaidez*, holding that *Padilla* did not apply retroactively to cases on collateral review. *See Chaidez v. United States*, 133 S. Ct. 1103, 1113 (2013). Shortly thereafter, the stay on proceedings in this case was lifted and the parties were instructed to submit another set of briefs, this time addressing their positions in light of the decision in *Chaidez*. Lee filed his (second post-hearing) brief on April 20, 2013, (Lee's Second Post-Hearing Brief, D.E. 54), and the government filed its response brief on June 20, 2013, (Gov's Resp. to Lee's Second Post-Hearing Brief, D.E. 58). Lee has remained housed at the federal detention facility in Mason, Tennessee, since his February 9, 2012 evidentiary hearing.

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[6] Interestingly, in its brief, the government conceded "that the petitioner's attorney was deficient in performance and that deficiency prejudiced the petitioner," (Gov.'s Resp. to Lee's First Post-Hearing Brief, D.E. 40 at 2), but nonetheless argued that Lee was not entitled to section 2255 relief because *Padilla* did not apply retroactively to his case.

II. PROPOSED CONCLUSIONS OF LAW

In his latest brief, Lee acknowledges that the *Chaidez* decision forecloses his ability to rely on *Padilla* to support a claim that Fitzgerald's mere failure to advise him of the mandatory immigration consequences of his plea was ineffective assistance of counsel under the Sixth Amendment. (Lee's Second Post-Hearing Brief, D.E. 54 at 1-2.) However, Lee contends that his guilty plea should nonetheless be set aside and his conviction vacated, even without the benefit of *Padilla*, because it has long been and remains the law, unaltered by *Padilla*, that an attorney's actual *mis*advice to his client regarding plea consequences, including deportation, is objectively unreasonable representation for purposes of an ineffective-assistance-of-counsel claim. (*Id.* at 4-5.) Finishing out that argument, Lee suggests that Fitzgerald did not merely fail to advise him of the immigration consequences of his plea but that in fact Fitzgerald affirmatively represented to him material yet erroneous information regarding those consequences.[7] (*Id.* at 6.)

In response, the government argues that *Chaidez* forecloses Lee's claim "that his attorney provided ineffective assistance by misadvising him of the deportation consequences of his guilty plea" because that claim, the same as the failure-to-inform claim,

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[7] Also in his brief, Lee argues for the first time two additional instances of ineffective assistance of counsel: (1) Fitzgerald's failure to defend Lee by failing to seek a nondeportable disposition and (2) Fitzgerald's failure to be aware of and strategize for a reasonably foreseeable extension of law in *Padilla*. Because this court finds that Lee is entitled to relief under his affirmative misadvice claim, it will not address these other two claims.

"only became viable after *Padilla*." (Gov.'s Resp. to Lee's Second Post-Hearing Brief, D.E. 58 at 7.) The government asserts that the law in place at the time of Lee's conviction was not as Lee states. (*Id.* at 9.) Instead, according to the government, the ineffective-assistance-of-counsel claims (in this context) that were recognized at the time of Lee's conviction involved attorneys who "took an active role in handling the immigration issue" and "engage[d] in *multiple* misrepresentations thereby overstating [the attorney's] knowledge and expertise concerning immigration issues." (*Id.* (emphasis added).) The government insists that only since *Padilla* has it been the law that an attorney acting as Fitzgerald did in this case is constitutionally deficient in performance. (*Id.*)

A. The Scope of *Padilla/Chaidez*

Lee's ineffective-assistance-of-counsel claim is viable only if and to the extent it does not rely on the *Padilla* holding which, per *Chaidez*, cannot apply to Lee's benefit because his conviction became final before the case was decided. It is therefore necessary to examine *Padilla* to determine the precise contours of the new rule that was announced in that case to then decide whether Lee's claim has support independent of that rule.

The facts at issue in *Padilla* were similar to the ones in this case: Padilla alleged that his counsel not only failed to advise him his guilty plea would result in deportation but also represented to him that he "did not have to worry about immigration status since he had been in the country so long." *Padilla*, 130 S. Ct. 1478 (citation and internal quotation marks omitted). *Padilla*'s famous and oft-cited holding, however, does not speak directly to affirmative misadvice such as is claimed here and arguably was

claimed in *Padilla*. Rather, the proposition for which *Padilla* stands is that the Sixth Amendment requires an attorney to inform his criminal-defendant client about the risk of deportation flowing from a guilty plea. *Id.* at 1486.

That is not to say that the concept of affirmative misadvice was altogether ignored in the *Padilla* opinion. To the contrary, in reaching its holding, the *Padilla* Court considered and rejected the suggestion of the United States (acting as *amicus curiae*) that the Court announce a rule limited to affirmative misadvice. *Id.* at 1484. The United States had insisted that "counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case" but "is required to provide accurate advice if she chooses to discusses [sic] these matters." *Id.* (citation and internal quotation marks omitted). The Court acknowledged that there were some lower court decisions "isolating an affirmative misadvice claim"[8] but declined to follow their approach, stating "there is no relevant difference between an act of commission and an act of omission in this context." *Id.* (citation and internal quotation marks omitted).

As stated before, the Supreme Court in *Chaidez* held that *Padilla* announced a new rule of law that does not apply retroactively. *Chaidez*, 133 S. Ct. at 1113. Unlike Lee's claim, however, the claim of the petitioner in *Chaidez* was based solely on her counsel's failure to inform her that her guilty plea (to mail fraud) carried the risk of deportation. There

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[8] The Court cited, as examples, *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005), *United States v. Couto*, 311 F.3d 179, 188 (2nd Cir. 2002), and *Sparks v. Sowders*, 852 F.2d 882 (6th Cir. 1988), among others.

was no claim that Chaidez's attorney affirmatively *mis*informed her as to that consequence. The Court noted as much in rejecting Chaidez's argument that the fact that some pre-*Padilla* lower-court cases recognized affirmative misadvice on immigration consequences as a basis for an ineffective-assistance-of-counsel claim proved that *Padilla* did not announce a new rule. *Id.* at 1112. This "separate rule for material misrepresentations," stated the Court, did not apply to Chaidez's case. *Id.* Plus, it did not support Chaidez's position that "all reasonable judges, prior to *Padilla*, thought they were living in a *Padilla*-like world" because in fact pre-*Padilla* it was almost universally held, even in those jurisdictions that recognized the "separate rule for material misrepresentations," that a defendant need not be advised of the deportation consequences of a guilty plea. *Id.; see also United States v. Chapa*, 800 F. Supp. 2d 1216, 1222 (N.D. Ga. 2011)(stating that, prior to *Padilla*, *Padilla*'s "conclusion had been rejected by . . . virtually every . . . court to address the issue"). *Padilla* completely altered that landscape by announcing that such advice was in fact required. Therefore, the *Chaidez* Court concluded, *Padilla* broke new ground, and defendants whose convictions became final prior to *Padilla* could not rely on the "new rule" from that case.

The "new rule" identified by the Court in *Chaidez* as having been announced in *Padilla* is one that speaks to the attorney's obligation to act (specifically, to advise). However, if, as Lee suggests, there was a rule in place at the time of his conviction that spoke not to the obligation to act, but rather to the obligation to, once choosing to act, do so competently by rendering accurate advice then, according to the Court's opinion in *Chaidez*, that rule is "separate"

from and undisturbed by the *Padilla* rule.[9] Such a "separate rule" lives in harmony with a pre-*Padilla* and post-*Padilla* world. Now, instead of limiting ineffective-assistance claims in this context to cases of affirmative misadvice, courts post-*Padilla* recognize such claims based on failure to advise as well. Thus, to the extent Lee's claim relies on a "separate rule" for affirmative misadvice in place at the time of his conviction, the fact that *Padilla* is not retroactive is inconsequential to Lee's case. *Cf. Silent v. United States*, No. 11-cv-5359(CBA), 2012 WL 4328386, at *5 & n.6 (E.D.N.Y. Sept. 19, 2012)(declining to stay a habeas petition pending the decision in *Chaidez* because petitioner's claim did "not turn on the distinction between failure to inform and affirmative misrepresentation," but instead depended on whether in fact there had been an affirmative misrepresentation).

B. Lee's Claim under the Law As It Existed before *Padilla*

Lee contends that the law in place at the time of his conviction was that erroneous advice concerning the risk of deportation form pleading guilty could constitute ineffective assistance of counsel. "True

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[9] Indeed, in the time since *Padilla* was decided, courts have continued to apply the "separate" affirmative misadvice rule to pre-*Padilla* convictions. *See, e.g., United States v. Pope*, No. 13 CV 598(RTD), 2013 WL 1463038, at *1 (E.D.N.Y. Apr. 12, 2013) (stating that the Second Circuit's affirmative misrepresentation rule is good law post-*Padilla* and –*Chaidez*); *Kovacs v. United States*, No. CV-12-2260(LDW), 2013 WL 55823 (E.D.N.Y. Jan. 2, 2013)(applying to a 1999 guilty plea the Second Circuit's pre-*Padilla* affirmative misadvice rule as if unaffected by *Padilla*); *United States v. Chapa*, 800 F. Supp. 2d 1216, 1224-25 (N.D. Ga. 2011).

enough, three federal circuits (and a handful of state courts) held before *Padilla* that misstatements about deportation could support an ineffective assistance claim." *Chaidez*, 133 S. Ct. at 1112 & 1111 n.12 (citing *United States v. Kwan*, 407 F.3d 1005, 1015-17 (9th Cir. 2005); *United States v. Couto*, 311 F.3d 179, 188 (2nd Cir. 2002); *Downs-Morgan v. United States*, 765 F.2d 1534, 1540-41 (11th Cir. 1985)). The government argues that these cases are distinguishable because they involved multiple misrepresentations from attorneys who misled their clients as to the attorneys' expertise in immigration law.

In *United States v. Kwan*, 407 F.3d 1105 (9th Cir. 2005), the petitioner filed a petition collaterally attacking his conviction by guilty plea to bank fraud. Prior to the plea, Kwan's attorney had advised him that although pleading guilty could technically result in deportation, "it was not a serious possibility," "based on [the attorney's] knowledge and experience." *Kwan*, 407 F.3d at 1008. The attorney also informed Kwan that "at his plea colloquy, the judge would tell him that he might suffer immigration consequences, but reassured him that there was no serious possibility that his conviction would cause him to be deported." *Id.* After Kwan entered the plea but before he was convicted and sentenced, Congress amended the Immigration and Nationality Act ("INA") to decrease the prison-sentence requirement for those aggravated felonies (a conviction of which results in mandatory, automatic deportation) of the category in which fell bank fraud, from five years to one year. *Id.* at 1008-09. The attorney did not inform Kwan or the sentencing judge of the change in the law. *Id.* at 1009. Kwan was convicted to a term of imprisonment of one year and one day and, subse-

quently, INS instituted deportation proceedings against him. *Id.*

The Ninth Circuit in *Kwan* held "where, as here, counsel has not merely failed to inform, but has effectively misled, his client about the immigration consequences of a conviction, counsel's performance is objectively unreasonable under contemporary standards for attorney competence." *Id.* at 1015. Here, the government argues that *Kwan*'s holding is limited to cases where an attorney holds himself out as an expert in immigration law. However, the fact that the attorney in *Kwan* held himself out as having "knowledge and experience" was not significant to the holding but to the factual finding that by failing to correct the earlier advice after it became incorrect, the attorney had misled his client. The holding in *Kwan* applies where the attorney has misled, in whatever way, a defendant about the immigration consequences of his plea, and while the fact that an attorney holds himself out as an expert in immigration might *contribute* to a finding that he misled his client, it is in no way crucial to such a finding under *Kwan*.

Similarly, in *United States v. Couto*, 311 F.3d 179 (2nd Cir. 2002), the Second Circuit held that "an affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is . . . objectively unreasonable" for purposes of an ineffective-assistance-of-counsel claim. *Id.* at 188. There, Couto inquired of her attorney whether she would be deported if she pled guilty to the charge of bribing a public official. *Id.* at 183. The attorney assured her that while deportation was possible, "there were many things that could be done to prevent her from being deported." *Id.* However, in reality, "because the

1996 amendments to the Immigration and Nationality Act eliminated all discretion as to deportation of non-citizens convicted of aggravated felonies, her plea of guilty meant virtually automatic, unavoidable deportation." *Id.* at 183-84. Couto's attorney, thus, had affirmatively misrepresented to her the deportation consequences of her guilty plea.

The government here argues that Lee's reliance on *Couto* is without merit because in *Couto* the attorney "took on an active role in handling the immigration issue." (Gov.'s Resp. to Lee's Second Post-Hearing Brief, D.E. 58 at 9.) Apparently, the government is referring to the fact that the attorney in *Couto* told his client that he would consult with an immigration lawyer and indeed Couto paid him to do so. *See Couto*, 311 F.3d at 183. However, nothing in *Couto* suggests that the Second Circuit in any way hinged its holding on the fact that Couto's attorney represented to her that he would seek out the expertise of an immigration lawyer. The *Couto* court devoted the majority of its analysis to explaining why it had chosen to adopt a rule applying to affirmative misadvice and spent only a single sentence applying the rule to Couto's case, stating "in the instant case, Defendant was affirmatively misled by her attorney." *Id.* at 188. With or without the attorney's promise to consult with an immigration attorney, the attorney in *Couto* affirmatively misrepresented to his client that her deportation was a matter of discretion, when in fact it was mandatory and automatic.

At the time of Lee's conviction, there was no Sixth Circuit-equivalent to *Kwan* and *Couto*. There was, however, *Sparks v. Sowders*, 852 F.2d 882 (1988), where the Sixth Circuit held that "gross misadvice concerning parole eligibility can amount to

ineffective assistance of counsel." *Id.* at 885. The petitioner in *Sparks* had pled guilty to murder upon the alleged advice of his attorney that if he went to trial and were convicted he would be sentenced to life and would be ineligible for parole. *Id.* That advice, however, was incorrect because even if the petitioner were given a life sentence, she would have been eligible for parole. *Id.*

Although *Sparks* was about parole eligibility and not about deportation, it nonetheless shows that the Sixth Circuit, before *Padilla*, was willing to recognize that affirmative misadvice concerning what might be deemed a "collateral" consequence of a conviction was, situationally, enough to support an ineffective-assistance-of-counsel claim.[10] It is but a logical extension of *Sparks* to hold that gross misadvice concerning another "collateral" consequence is constitutionally deficient representation. This is especially true of the "collateral" consequence of deportation, which may be in many cases a consequence even more undesired than parole ineligibility. Indeed, long before *Padilla*, the United States Supreme Court recognized that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *INS v. St. Cyr*, 553 U.S. 289, 323 (2001)(citation and internal quotation marks omitted).

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[10] *See United States v. Francis*, No. 5:10-CV-7114-KSF, 2010 WL 6428639, at *9 (E.D. Ky. Dec. 30, 2010)("While *Padilla* abrogated any reading of *Sparks* [*v. Snyders*] to restrict [ineffective-assistance] relief to affirmative misadvice, *see Padilla*, 130 S. Ct. at 1484, the holding that gross misadvice can situationally amount to ineffective assistance of counsel remains good law.").

In order to show ineffective assistance of counsel, Lee must satisfy the two-part test established in *Strickland v. Washington*, 446 U.S. 668 (1984): he must demonstrate (1) that "counsel's representation fell below an objective standard of reasonableness counsel's representation fell below an objective standard of reasonableness;" and (2) that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 688 & 694. In the context of guilty pleas, the first part of the test is met when an attorney's actions are shown to have been outside the range of competence demanded of attorneys in criminal cases. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). To show prejudice in this context, the petitioner must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*

As to *Strickland*'s first prong, this court finds that Fitzgerald's representation of Lee was objectively unreasonable in that he affirmatively misadvised Lee as to the immigration consequences of pleading guilty to the drug-trafficking crime for which Lee was indicted. As explained above, at the time of Lee's conviction, it was the unanimous view of the federal circuits having had occasion to consider the question, that affirmative misadvice, as opposed to mere failure to advise, a defendant regarding the risk of deportation from a guilty plea constitutes objectively unreasonable representation under *Strickland*.[11] Furthermore, the Sixth Circuit at that

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[11] In addition to *Kwan* and *Couto*, see *Downs-Morgan v. United States*, 765 F.2d 1534, 1540-41 (11th Cir. 1985)(recognizing the

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time recognized already "that affirmative misadvice concerning nonimmigration consequences of a conviction can violate the Sixth Amendment even if those consequences might be deemed 'collateral.'" *Padilla*, 130 S. Ct. at 1493 (Alito, J., concurring)(citing, *inter alia*, *Sparks*, 852 F.2d at 885).

The government argues that Fitzgerald did not affirmatively misadvise Lee, and, to the contrary, informed Lee that deportation was a possibility. That argument ignores that the attorneys in *Kwan* and *Couto* were both found to have affirmatively misled their clients even though they in fact had mentioned to their clients the possibility of deportation. Presumably, this was so because the other advice these attorneys had given to their clients provided false assurance that the possibility of deportation was not a *real* one. The same is true here. In representing to Lee that "the government" was not seeking to deport him after his guilty plea, Fitzgerald led Lee to the erroneous conclusion that a) to the extent deportation could stem from his guilty plea, it was discretionary not automatic and b) that the government had exercised that discretion *against* deporting him. Thereby, Fitzgerald's representation of Lee fell below an objective standard of reasonableness.

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possibility of an ineffective-assistance claim where counsel affirmatively misrepresents the deportation risk of a guilty plea and the defendant faces imprisonment and/or execution upon being deported) and *Santos-Sanchez v. United States*, 548 F.3d 327, 333-34 (5th Cir. 2008)(implying that counsel's advice might be objectively unreasonable under *Strickland* where such advice constituted an "affirmative misrepresentation" regarding the deportation consequence of a guilty plea).

As to *Strickland*'s second prong, the government argues that Lee cannot establish prejudice because a decision to reject the guilty plea would not "have been rational under the circumstances." (Gov.'s Resp. to Lee's Second Post-Hearing Brief, D.E. 58 at 10.) This is in contrast to the position that the government took in its response to Lee's first post-hearing brief: there, the government stated, "[i]n light of the testimony during the hearing, the United States concedes the petitioner's attorney was deficient in performance and that deficiency prejudiced the petitioner." (Gov.'s Resp. to Lee's First Post-Hearing Brief, D.E. 40 at 2.) The government went on to state, in its prior response, "[t]he record evidence elucidated that based on the petitioner's long-term ties to the United States and businesses that he owned or operated in the United States, the petitioner faced severe sanctions and would not have pleaded guilty but insisted on going to trial." (*Id.*)

The government's position in its prior brief on the issue of prejudice is not much different from Lee's. Lee argues that "his life-bonding ties are in the United States," and he "had nothing to lose by going to trial if the alternative was to be deported" because he has not been back to Korea since he left there as a child and has no connections of any sort in that country. (Lee's Second Post-Hearing Brief, D.E. 54 at 8.)

It is true, as the government now asserts, that the test for prejudice is objective, not subjective, *see Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012), and that a prediction of the likely outcome at trial is frequently dispositive of the inquiry, *see Maples v. Stegall*, 340 F.3d 433, 440 (6th Cir. 2003). However, Lee's likelihood of success at trial is decidedly *not* dispositive of the prejudice issue, i.e.,

whether "a decision to reject the plea bargain would have been rational under the circumstances," *Pilla*, 668 F.3d at 373 (citation and internal quotation marks omitted), because among the relevant circumstances here is the severe undesirability of Lee's returning to Korea. According to Fitzgerald, Lee's sentence, if he were convicted following at trial, would likely range from three to five years imprisonment, and, if he pled guilty, he would probably face zero to two years imprisonment. If Lee had known that either option resulted in mandatory, automatic deportation, it would have been rational for him to choose to go to trial, whatever the likelihood of success and even though he might face one to five years greater a sentence than if he had pled guilty, because under the circumstances, deportation was, objectively, at least as undesirable as any prison sentence. As such, Lee has established that he was prejudiced by his trial counsel's errors under the second prong of the *Strickland* test.

Accordingly, this court concludes that Lee's drug-trafficking conviction was obtained in violation of his Sixth Amendment right to the effective assistance of counsel and therefore cannot stand.

III. RECOMMENDATION

Based on the foregoing, the court recommends that Lee's Section 2255 motion to set aside his guilty plea and to vacate his conviction for ineffective assistance of counsel be granted.

Respectfully submitted this 6th day of August, 2013.

s/ Diane K. Vescovo
DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

NOTICE

Within fourteen (14) days after being served with a copy of this report and recommended disposition, a party may serve and file written objections to the proposed findings and recommendations. A party may respond to another party's objections within fourteen (14) days after being served with a copy. FED. R. CIV. P. 72(b)(2). Failure to file objections within fourteen (14) days may constitute a waiver of objections, exceptions, and further appeal.